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No. 3721

1299

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

W. R. GRACE & COMPANY
(a corporation),

Appellant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD. (a
corporation) and ROBERT NETTLEFOLD,

Appellees.

BRIEF FOR APPELLANT.

Upon Appeal from the Southern Division of the United States
District Court for the Northern District of California,
First Division.

ANDROS & HENGSTLER,
LOUIS T. HENGSTLER,
F. W. DORR,

Proctors for Appellant.

FILED

OCT 6 - 1921

F. D. MONCKTON,
CLERK.

No. 3721

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Upon Appeal from the Southern Division of the United States
District Court for the Northern District of California,
First Division.

I. Statement of the Case.

1. On February 25, 1916, libelant and respondent entered into the following agreement:

“San Francisco, February 25th, 1916.
Ford Motor Company,
San Francisco, Cal.
Gentlemen:

Attention Mr. L. C. Davis.

We confirm freighting engagement as follows:

Commodity: 6200 tons (40 cubic feet each) automobiles and parts, in packages.

Rate: \$47.50 per 40 cubic feet measurement from San Francisco to Wellington, New Zealand, and /or Sydney, Australia, freight prepaid; quantity for each port to be declared within ten days from date.

Shipment: Per American S. S. 'Cacique' June loading; when vessel is closer at hand, will advise you more definitely as to exact loading date.

Delivery: To be delivered alongside steamer at San Francisco as fast as vessel can load, otherwise shippers to pay demurrage at rate of \$3000 per day.

Total shipment weighs approximately 1550 tons (2240 pounds each) measuring about four to one.

Yours very truly,

W. R. Grace & Co.

(Sgd.) H. E. Moore,

Accepted: Traffic Manager.

(Sgd.) Ford Motor Co. of Canada, Ltd.

By L. C. Davis."

(Exhibit "A", *46)

On March 2d, respondent wired to its agent at San Francisco:

"Understand you have arranged 6200 tons, our understanding this is the only contract you have arranged, and this is all we will need to end of July." (269)

* Figures in parenthesis refer to pages of apostles.

On March 3d, respondent wired to its agent at San Francisco:

“Understand you have engagement by steamer named Cacique. We are also informed you have engaged 6200 tons. We need only about 6000 tons in addition to what we arranged, and would like this for June-July sailing; advise.”
(270)

2. Libelant was at all times willing and eager to carry out the contract. Respondent, on the other hand, decided shortly after making this contract that it was unprofitable, and exhibited many symptoms of a desire to extricate itself from its obligations on divers grounds. Eventually, and shortly before performance on the part of respondent became due, the Southern Pacific Company, which held that portion of the Cacique consignment which respondent chose to offer, was instructed by respondent to “not, under any circumstances, deliver any of the cargo at present on hand booked steamer Cacique to W. R. Grace & Co.” (304, 305)

On March 28th, respondent wired to its San Francisco agent:

“You state 6200 tons. We will be able to give 4284 tons * * * ” (272)

On the same day respondent wrote to its San Francisco agent:

“That we do not need the 6200 tons, is due to the fact that we have succeeded in obtaining two steamers from the New Zealand Shipping Company, one sailing out of St. John on the 20th of April and one sailing out of Montreal

on the 20th of May, taking a considerable number of cars which otherwise would have had to go by Steamer Cacique * * * ” (316)

On March 29th, the San Francisco agent wired to respondent:

“Steamer Cacique goes Wellington Sydney only; see contract; you should arrange 6200 tons accordingly.” (316)

There was a misunderstanding between respondent and the San Francisco agent who, in a letter to respondent, dated April 3, 1916, says, among other things:

“We have your letter of the 30th in which you advise you had not received contract which we executed with Grace & Co. for 6200 tons per their steamer Cacique for June sailing, and to say that we were surprised at your letter is expressing it mildly. * * *

* * * The contract has been entirely arranged for, and we wired you today we are compromised for 6200 tons and will be obliged to pay dead-freight for any unshipped portion * * * We trust that nothing will stand in the way of your fulfilling same and supplying the steamer Cacique with the tonnage as originally contracted for.” (272, 273, 274)

On the same date the San Francisco agent for respondent wrote to its principal:

“With considerable surprise note that you will only have 4284 tons for the contract which we signed to cover 6200 tons. At the time of writing this letter, we have not taken this matter up with the W. R. Grace Company, but we feel that when it is taken up with them they will desire to cancel our contract entirely.” (274)

On the same date said agent wired to respondent:

“We are definitely compromised for 6200 tons for this vessel otherwise dead freight will be payable on any unshipped quantity. (275)

Answering the last wire, respondent wrote to its agent (April 4, 1916):

“We are sorry that we did not know the existence of this contract * * * Had we had it, we would not have made certain space engagements for May, for which we received a very advantageous rate by the New Zealand Shipping Company out of Montreal, a rate of \$35.00 per ton. We did not know that your booking with the Grace Company was firm for this whole amount, and took up the balance of the 6200 tons over and above 4284 tons of which we advised you we had present specifications for, by this New Zealand steamer.

However, we expect certain additions from Australia, which will no doubt bring our specifications up to the required amount.” (276)

In a letter, in answer to the last letter, the agent wrote, on April 10, 1916:

“Our correspondence prior to the mailing of the contract referred to 6200 tons, and we had never at any time specified any smaller amount for this boat, and we, of course, thought the matter was thoroughly understood by you.

We hope that you will be able to supply the tonnage as W. R. Grace & Company have contract for more tonnage for this boat and as you know, it must go down there and return empty, and as they have arranged their schedule you realize the importance of our fulfilling our contract. If you think you will not be able to supply this cargo, kindly let us know imme-

diately or as soon as practicable in order that we may take the necessary steps to secure tonnage at this end.” (277)

In another letter of the same date (April 10th), the agent wrote to his principal:

“Of course, at this time it is too late for W. R. Grace & Company to withdraw as they have signed up sufficient cargo in addition to our 6200 tons that at the present time it is impossible for them to withdraw their ship.” (278)

On April 19, 1916, respondent wrote to its San Francisco agent as follows:

“We understand that we are supposed to have 6200 tons on this steamer * * * Actually we have cars for only 4572 tons * * * *We engaged space for certain cars by the S. S. ‘Whakatane’ and ‘Paheka’ of the New Zealand Shipping Company, which otherwise would have gone on the S. S. ‘Cacique.’* There will be about 1628 tons space which we will be unable to use.” (278, 279)

On May 1st, respondent wired to the San Francisco agent:

“We start Cacique contract today—writing full particulars as to quantity ports and dates of shipment 1316 cars in all.” (315)

On May 2nd, the San Francisco agent wired to respondent:

“Your wire today Cacique contract still 540 tons short—can you complete it—otherwise we must secure other cargo at probable loss.” (315)

On May 4th, respondent wrote to its San Francisco agent:

“We have intimated to you that *we cannot take the whole amount of the cargo on the Cacique.*” (280)

On May 5th, the San Francisco agent made an agreement with Henry W. Peabody & Company, on behalf of respondent, which

“covers 542 measurement tons of 40 cubic feet each per W. R. Grace & Company’s S. S. Cacique, *loading at San Francisco about July 1st* for Sydney & Wellington.” (313, 314)

On May 6th, respondent wrote to its San Francisco agent:

“In order *as far as possible* to *approximately* fill our reservation by this boat it will be necessary for us to turn down extremely favorable rates out of the Port of New York. We wish you would let Grace & Company know this. We enclose copy of wire received from our New York Foreign Department in which they quote us a firm rate of \$40.00 out of New York. You will understand how extremely favorable this rate is when we have so much less inland freight to pay.” (315)

On May 11, 1916, respondent wrote to its San Francisco agent:

“We are enclosing herewith our May schedule showing the number of cars which will be shipped from the factory each day for the steamer Cacique. This will amount to 1288 cars.

We advised you sometime ago that *we would have 1316 cars for the Cacique; but we find it impossible to ship this number on account of new method of crating.*” (282, 283)

In a letter from the San Francisco agent of respondent to its principal, dated May 12, 1916, the agent shows that

“We are still shy a cargo for this ship” and requests “that you advise us as soon as possible just what tonnage you will use * * * so that Grace & Company will be able to tell just about how much freight will be left at Sydney and how much at Wellington in order to enable them to properly stow other cargo.” (283, 284)

(Under the contract it was the duty of respondent to make these declarations before March 5, 1916; this duty remained un-preformed on May 11, 1916.)

On May 12, 1916, the San Francisco agent of respondent wrote again to its principal:

“Please let us know as soon as possible as far as you can the total amount of tonnage for this boat, also just how much will be discharged at Sydney and Wellington.” (285)

On May 15th, the San Francisco agent wired to respondent:

“Please wire without fail Tuesday morning total cubic measurement shipments for Cacique for Wellington and Sydney. Grace & Company must have this information immediately to figure steamers stowage and cargo requirements.” (313)

On May 16th, respondent answers:

“Total cubic measurement on shipments for Cacique for Sydney 761 tons, Wellington 1190 tons, other ports 2017 tons, four carloads of parts 116 tons—total 4084 tons.” (312)

On same day libelant wired to respondent:

“Your wire gives total 4086 tons. Must have full quantity 6200 tons covered your freighting contract February 25th or payment dead freight on quantity not shipped. We regret time now too short us arrange other cargo.” (130)

On May 18th, the San Francisco agent wired to respondent:

“Your wire May 5th indicates 5087 tons total for Cacique May 16th you advise total 4084 tons Wire immediately exact Cacique tonnage in order we can contract for unused space. Probability unable secure rate 47.50 Unless we can complete cargo we will have severe loss. Please advise definitely.” (312)

On May 19th, the San Francisco agent wired to respondent:

“Please reply our wire 17th regarding total tonnage for Cacique Must know how much space to fill.” (312)

On the same day respondent answered by wire:

“Advise Grace Sydney 762 tons Wellington 1188 tons. Stop. Will likely give about another 1000 tons for Melbourne making 5075 tons shipped from here having a shortage of about 600 tons * * *” (311, 312)

On May 20th respondent wrote to its San Francisco agent:

“We have written you a concurrent letter indicating the fact that there has been a misunderstanding in connection with the space on the ‘Cacique’. We had not assumed that we were going to be held for 6200 tons space.” (285, 286)

On May 22nd respondent wired to its San Francisco agent:

*“Cannot give you balance of contract in July not likely until August and following months * * ** In view of Union being behind on its schedule would it not be possible to transfer these cars to Cacique and replace to Union later on in year?” (311)

On May 23rd respondent wired to San Francisco agent:

“Do everything possible to sublet Cacique 1500 tons if cannot borrow from Union, as it looks as if we cannot get out the 1000 tons additional of which we advised yesterday.” (311)

On May 25th libelant wrote to respondent:

“Although a week has elapsed, we are without reply to our telegram to you May 18th * * * We confirm, as stated in our wire above, that we must have the full quantity of cargo which you have contracted to deliver to us for S. S. Cacique for Wellington and Sydney, that is, 6200 tons of 40 cubic feet each, or in lieu of this amount of cargo the payment of dead freight on any portion of the contract not shipped. The time is too short to enable us to secure other cargo.” (130, 131)

On May 25th respondent wired to San Francisco agent:

“Deny we are offering space New York except for August sailing.” (311)

On the same day respondent wrote to San Francisco agent:

“For a considerable length of time we did not know what if any arrangements you had

made with the owners of the 'Cacique'. During this period we entered into negotiations for the forwarding of cargoes on the steamship 'Whakatane' and 'Pakeha'. We would not have accepted these arrangements, had we known your arrangements were completed * * *'' (287, 288)

"Even at that time we had sufficient tonnage to make up this full cargo. We had warned the factory to make their experiments conclusive at the outset in the knocked down method of shipment. We had warned them that *cutting down the space on the knocked down shipments during the progress of the filling of any contract would materially alter our calculations.* They, however, went forward with these experiments *and we really did not appreciate the extent of the saving until we came to tote up the amount of space which we still had to fill on the steamer Cacique* * * * However, if we are in for it for this 1500 odd tons' space which, notwithstanding the Peabody contract which we figure we still have to take care of upon the steamer 'Cacique', we want you to use every means in your power to sub-let this space." (288, 289)

On May 26th, respondent wired to San Francisco agent:

"Cacique total cargo from factory will be 4075 tons." (311)

On May 27th, the San Francisco agent wrote to respondent:

"With regard to space on the 'Cacique' which you will not be able to fill and for which we are obligated, we have been doing our utmost to secure tonnage at \$47.50." (292)

On May 31st, the San Francisco agent wired to respondent:

“Union Company say all cars at present here will leave by Coolgardie June 1st., Waimarino or Floridian end of June. *Any cars here 'after July 1st they will give to Grace. * * **” (293, 294)

On the same day respondent wrote to its San Francisco agent:

“It is a further surprise to us to note that up until Saturday last, we were still led to believe that the ‘Cacique’ would sail on the 14th of June. This was the latest information from you. We had to do considerable wiring to get any *different information* * * * This information relayed to Australia some time ago would have allayed a considerable *fear on their part that shipments would arrive piling up one on the other causing congestions to a considerable degree.*” (294, 295)

(Showing that the three shipments on the steamers of the Union Steamship Company, during June, caused a congestion of cars in Australia, and that a *late* arrival of the Cacique at San Francisco was the desire and hope of respondent and its San Francisco agent. This is confirmed by the next letter:)

On June 1st, the San Francisco agent wrote to respondent:

“They (Union Steamship Company) are willing to allow us to have any cars which might arrive later than July 1st or after the ‘Floridian’ or ‘Waimarino’ sail which we can turn to Grace & Company for the Cacique.” (297)

On June 1st, Union Steamship Company wired to respondent:

“We cannot give any of these cars to Grace Company, but we are willing to give Grace portion of our consignment which has not reached us yet, provided you replace the quantity we let go.” (298)

On June 1st, respondent had more tonnage engaged than it could use.

On June 1st, respondent wrote to libelant, answering the letter of May 25th, and giving the tonnage for the Cacique by ports, making a total tonnage of 4075 tons, saying:

“In addition we have effected an arrangement with the Union Steamship Company to transfer to you 1500 tons of the tonnage now on the coast originally contemplated to go forward by Union Steamships. We understand that you have let 524 tons additional, making 6099 tons all told of the 6200 tons allotted to us.

This letter and the above arrangement is without prejudice to our rights to contend that any engagement purporting to have been entered into on our behalf, has not been carried out by yourselves, in that, such an engagement calls for June loading, which in the parlance must necessarily mean June shipping, whereas we understand the Steamer Cacique will not leave until about the 10th of July. * * *

We wish it, therefore, definitely understood that if by reason of the above and other circumstances, our plans for supplying 6200 tons for this vessel do not carry through, we do not consider our obligation binding.” (48, 49)

This letter was received by libelant on June 5th.
(131)

On June 3rd, respondent wrote to its San Francisco agent:

“We are sending you under separate registered mail today three copies of all invoices covering autos and parts and two copies of all bills of lading covering same which we expect to go forward on the following steamers:
Coolgardie June 3rd
Waimarino June 30th
Cacique *July 12th*”(309)

On June 6th, libelant wrote to respondent, answering its letter of June 1st, saying:

“We note with surprise your remarks on the subject of June loading, and, of course, do not agree with the contention which you reserve. We certainly cannot understand how, if you were not able to supply the agreed tonnage by a later date, your plans to supply it at an earlier date could have been disturbed, and will accomplish our contract in accordance with its terms.” (135)

On June 6th, the San Francisco agent wired to respondent:

“Grace now figures ‘Cacique’ will clear about July 5th.” (308)

On June 7th, the San Francisco agent wrote to respondent:

“We sincerely hope that you will be able to fill the space with your own cars rather than let it go to any other concern for a lower figure.

Regarding the change of dates of Cacique sailing, information has come to us which had not previously been made public to the effect that the Cacique had met with an accident after leaving Vladivostok, Russia, which necessitated repairs and again it was necessary to put her on the ways in Hong Kong which further delayed the boat, and we were only recently informed of this change, although the movements of the boat had led us to believe that it would be much later than the middle of June before her departure, *and it is now our hope that she will even be as late as the 10th of July as we wired you recently.*" (308, 309)

On June 9th, the respondent wired to San Francisco agent:

"Owing congestion large quantity cars arriving Australia at one time may be necessary to cut down Cacique cargo by Sydney, Brisbane and Melbourne cars and ship these later * * * Do not load any cars Cacique unless Grace agrees that their default has voided any alleged contract, and that 4600 tons less what may be held as above will be loaded at \$47.50 per ton and this cargo will not be held for freight for the balance." (300)

On June 9th, respondent wired to San Francisco agent:

"We have already written Grace and Company that sailing date in July voids any contract even admitting there is one binding on this company which we do not. From the outset we have made it clear that we consider ourselves bound for 4076 tons, plus Peabody space, that is 4600 tons. Before any cars loaded on Cacique see that this understood with Grace so that the loaded cargo will not be held for entire freight; otherwise do not load any." (302)

On June 10th, respondent wired to San Francisco agent:

“Our wire ninth have decided to not hold up shipments to Sydney Brisbane Melbourne. Will load 4600 tons all told provided Grace agree this is in fulfilment of any contract and will not hold what loaded for entire freight.” (302)

On June 13th, San Francisco agent wired to respondent:

“Grace insist on 6200 tons or freight on unused space.” (303)

On June 13th, respondent wrote to San Francisco agent:

“Will you please also write Messrs. Grace & Company and inform them that the 4075 odd tons is the full cargo for the S. S. Cacique; that we recognize no contract binding upon this company to forward 6200 tons for this vessel and that unless the 4075 tons is taken on this understanding, and not subject to freight for 6200 tons we will not load any of this cargo.” (307)

On June 14th, respondent wrote to libelant:

“Any arrangements that you have made for 6200 tons were effected through Ford Motor Company of San Francisco, which arrangements we do not, and never have considered binding upon this company, and which information we have previously given you and now repeat.

We have forwarded 4075 odd tons of cargo for your S. S. Cacique at an ocean freight rate of \$47.50. *This is the entire cargo that we will forward for the vessel*, and is the cargo that you have been informed from time to

time would be forwarded for this vessel. *If you wish to accept this cargo, you are at liberty to do so on these terms. If you take the attitude that there is a contract binding upon this company for 6200 tons' space, and attempt to hold this 4075 tons cargo for freight for 6200 tons at the above rate we will decline to load any of the cargo whatever.*" (50)

This letter was received by libelant on June 23rd.
(135)

On June 22nd, the San Francisco agent wrote to respondent:

"We have issued instructions to the Southern Pacific Company, who now have in their possession all of the consignment for the Cacique, to hold same until they receive from us instructions to deliver to Grace & Co." (303, 304)

On the same day the San Francisco agent wrote to Southern Pacific Company:

"Until you are advised to do so, please do not, under any circumstances, deliver any of the cargo at present on hand booked steamer Cacique to W. R. Grace & Co." (304, 305)

On the same day libelant advised respondent:

"Please note the delivery of 6200 tons automobiles and parts full quantity of your engagement under contract dated February 25 must commence on that date, June 27, and be completed not later than June 29." (142)

The letter dated June 14th, sent by respondent to libelant, was received by libelant on June 23rd.
(106) On that day, then, libelant was notified in

unmistakable terms that respondent repudiated the contract for 6200 tons. On the preceding day the Southern Pacific Company had been instructed by respondent not to deliver any cargo to libelant. On the following day, June 24th, the San Francisco agent of respondent sent to libelant the following notice:

“We are in receipt of advice from our Ford Ontario factory in which they request that we inform you that 4075 odd tons is the full cargo for the steamer Cacique, and *that they recognize no contract binding upon them to forward 6200 tons on this vessel.* Also that unless the 4075 tons is taken on this understanding and not subject to freight for 6200 tons, they request that *we withhold loading any of this cargo.*” (109)

This letter was received by libelant on June 26th. (137)

On June 26th (a Monday) libelant sent a telegram to respondent, reading:

“Referring to your contract with us of date February 25, 1916, wherein you agree to ship 6200 tons 40 cubic feet each of automobiles and parts, in packages, at \$47.50 per 40 feet cubic measurement, freight prepaid, *since you have informed us, in your letters of the 14th and 24th inst. that you will not deliver to us the 6200 tons which you agreed to deliver, we now have to advise you that we stand strictly upon the contract made with you, and insist upon your fulfillment of the same in every particular.* We are, and have always been, ready to perform all of our obligations under said contract. We further advise you that *we will take such quantity of automobiles as are*

delivered to us, and hold you responsible for all damages, including demurrage, which we may ultimately sustain by reason of any breach of said contract. By taking a smaller quantity of automobiles than the quantity which you contracted to deliver, we do not accept such smaller quantity as a full satisfaction of the contract of February 25th, but only as the *partial satisfaction* which it, in fact, is; and by the acceptance of any such smaller quantity we do not in any way release or waive any claim for damages or demurrage due to your breach of your contract.” (138, 139)

About June 22nd, 23rd and 24th, the Southern Pacific Company had deposited about 1100 packages on libelant's wharf. Thereafter Mr. Moore, agent for libelant, who had charge of this transaction received a telephone message from the local office of the Southern Pacific Company advising “that the delivery of that cargo to the Cacique had been held up, on instructions received, I believe, from the Ford Motor Company”. (318) “Mr. Hardy asked me if he could get back the packages which had been delivered to the wharf.” (319) “Some of this freight was delivered to the wharf after they received this notice from the Ford Co. to hold it up.” (319) Mr. Moore thereupon reported these facts to his superior in libelant's office:

“Mr. Moore reported that he had had this telephone from the Southern Pacific Office, and had been there, and had called and had learned that this cargo then on the dock *had been delivered by them by mistake, and they wanted*

it returned; this in view of the fact that they had received instructions from the shippers not to deliver the cargo.

Q. Did you, or W. R. Grace & Co., at any time thereafter receive any notice from the Ford Motor Co., or anybody acting for the Ford Motor Co., advising you that these cars were now available for shipment on the Cacique? A. No.” (321)

The Southern Pacific Company, thereafter, and in the forenoon of June 27th (251) advised counsel for libelant of the instructions received by respondent not to deliver the cargo to the Cacique, and inclosing the original letter of instructions, on the letter head of the Ford Motor Company, Automobile Manufacturers, San Francisco, June 22, 1916, reading:

“Until you are authorized to do so, please do not, under any circumstances, deliver any of the cargo at present on hand booked steamer Cacique to W. R. Grace & Co.

Ford Motor Co.

Traffic Department,

L. C. Davis.” (262)

Thereafter, and on the same day, the libel was filed.

Many of the facts disclosed by this correspondence were not known to libelant before the day of the trial. Libelant called for the correspondence at the trial, and respondent produced what it could, explaining at the same time that the American Ford Company’s office at San Francisco “having no interest in this suit, destroyed their files two years ago”. (264) From the correspondence produced it appears, however, clearly:

1. That respondent had contracted for more space in steamers bound for Australia than it had cargo to fill, being offered cheaper rates by other carriers after making the Cacique contract.
2. That there was a congestion of automobiles in Australia.
3. That respondent was never ready to prepare or ship 6200 tons, as it had contracted.
4. That, for all of these real reasons, respondent was anxious, if possible, to have this contract cancelled.
5. If it could not be cancelled, then respondent *was anxious to have its performance delayed* beyond June and until such time as it would have enough cargo ready, and Australia would be ready to absorb it.
6. To get rid of the contract, respondent, *pretended* at first that the contract had not been received in the East, and later that the San Francisco agent had no authority to make the contract, because Ford Motor Company of Canada and Ford Motor Company of San Francisco were two distinct entities. Both of these pretences were later abandoned, when the ingenuity of the legal department discovered more plausible reasons.
7. One of the new reasons for rejecting the contract was that the contract required a June *sailing* of the Cacique. This was palpably wrong.
8. A more plausible alleged reason for rejecting the contract was finally relied upon, viz., a construction of the contract to the effect that libelant *must* perform in June, but could not become ready to perform in June. This latter construction is inconsistent with its earlier construction to the effect that loading in July would have been a compliance.

The difficulties and inconsistencies in which respondent became involved in its endeavor to find plausible grounds for extricating itself from an unwelcome contract appear not only in the correspondence, but also in respondent's answer. To illustrate:

Respondent alleges:

“That the said Southern Pacific Company, on the 23d and 24th days of June, 1916, delivered into the custody of libelant, on Pier No. 26, approximately 1115 packages of automobiles and parts, in packages, measuring approximately 1500 tons, for shipment on said steamship Cacique * * * that at the time of said delivery to libelant said steamship Cacique had not arrived in the port of San Francisco on her inward voyage from Oriental Ports, and at said time a strike of stevedores was prevailing among the wharves in the harbor of San Francisco, and particularly against libelant herein; *that on the 24th day of June, 1916, claimant and respondent, being advised that the delivery of any more of said cargo on said pier would endanger the safety of said cargo at the hands of strikers, and that the surrender by the Southern Pacific Company of possession of said cargo under the circumstances might entail great loss to claimant and respondent in the event that said automobiles and parts were destroyed by fire, after they had left the possession of said railroad company on said wharf and prior to being loaded on the said steamer Cacique when in readiness and in fit condition to load the same, and having no definite assurances from libelant as to the date when said cargo would be loaded upon the said steamship Cacique, then instructed said Southern Pacific Company not to make further deliveries to libel-*

*ant until notified so to do by claimant and respondent, and that it was necessary that said Railway Company should retake into its possession the portions of said cargo already delivered. * * **” (32-34)

Respondent further alleges, with reference to the delivery by the Southern Pacific Company, on libelant's pier, of the 1115 packages, on or about June 23rd and 24th.

“That at said time a strike of stevedores prevailed on the wharves in the harbor of San Francisco, and particularly against libelant, and thereupon claimant and respondent, fearing possible damage to its said packages of automobiles and parts from fire and violence, and not knowing whether said S. S. Cacique, which had not then arrived in the port of San Francisco, would be able to load and sail with said cargo during the month of June, as required by said contract of February 25, 1916, on June 24, 1916, requested said Southern Pacific Company to delay further deliveries until instructed by claimant and respondent to make them, and to retake into its possession the said packages previously delivered to libelant. * * * ” (39)

Respondent further alleges that:

“Thereafter, on said 27th day of June, 1916, and prior to the filing of the libel herein, the said S. S. Cacique having arrived at the port of San Francisco on that day and having berthed at said Pier No. 26, *claimant and respondent withdrew its said order and request to the Southern Pacific Company.* * * * ” (40)

In answer to these allegation, we say:

The evidence produced at the trial shows that the allegations are *untrue*. The order to the Southern

Pacific Company, given on June 22nd (*before* the goods were placed on the wharf) were *not* given for the Pecksniffian reasons alleged in the answer: that respondent feared temporarily for the safety of its goods, but were given to enforce the threat previously made to libelant: "If you take the attitude that there is a contract binding upon this company * * * we will decline to load any of the cargo whatever." (50) The bold allegation that respondent withdrew its order to the Southern Pacific Company prior to the filing of the libel, the Cacique having arrived and berthed at its pier, is also *untrue*, for the conclusive reason that it is *impossible*, the libel having been filed before the Cacique arrived and berthed.

As to the allegations in respondent's answer that the 1100 packages which were deposited by Southern Pacific Company on libelant's wharf

"were then in the possession of libelant in part performance by claimant and respondent of said agreement of February 25th," (34)

and as to the inference suggested by the allegation

"that if the loading of said cargo did not commence at the time when libelant gave notice of the readiness of said steamship to load the same, it was due to the act of libelant in attaching said cargo," (42)

viz.: the inference that respondent was then ready to load any cargo, it is flatly disproved by respondent's orders to Southern Pacific Company, which orders were in line with the attitude assumed by

respondent that, if libelant insisted upon its contract, respondent would “decline to load any of the cargo whatever.” (38)

The Questions Involved.

First: The fundamental question involved in the case is the proper construction, under all the circumstances of this case, of the clause:

“Shipment: Per {American S. S. Cacique June loading; when vessel is closer at hand, will advise you more definitely as to exact loading date.”

Libelant contended in the District Court, and contends now that the words “Cacique June loading” were used by the parties to designate the second loading of the Cacique after the date of the contract, expected to be in June, excluding the first loading after the date of the contract, expected to be in March or April. Respondent contended that loading of the cargo during the month of June was a condition precedent, and that it was libelant’s imperative duty to begin and end loading in June.

Second: The second question of importance is the question of fact at issue between the parties, whether the contract was breached, either actually or by anticipation, libelant contending that respondent was never ready or willing to perform its contract, and finally breached it, both by anticipation and actually.

Third: The third question of importance is the measure of the damages to which libelant is entitled.

Fourth: At the trial in the District Court a new, and technical, question was injected into the case, based upon the alleged defence that libelant lost its right of action by accepting a part performance under the contract after respondent's anticipatory breach.

The District Court, holding that there had been no actual breach of the contract when the action was commenced, and that libelant had then waived any anticipatory breach by accepting a part performance of the contract, dismissed the libel. The case being decided on the technical point was never considered on its true merits. The "fourth" question, having become the decisive one in the lower court, will be discussed herein first, and, this being a trial de novo, we will, thereupon, take up the discussion of the substantial points upon which this controversy depends.

Argument.

I. THERE WAS AN ACTUAL BREACH OF THE CONTRACT BY RESPONDENT WHEN THE LIBEL WAS FILED.

The situation, on June 27th, was the following:

1. When the action was commenced, respondent had sent to San Francisco 180 carloads of automobiles (making 4075 tons, instead of 6200 tons, required by the contract).

2. 150 out of these 180 carloads were in the possession of the Southern Pacific Co., and 30 carloads had been deposited by Southern Pacific Co. on libelant's wharf.
3. Respondent had notified libelant, in effect: We will not give you any part of this freight under the terms of the contract of February 25th; we do not recognize this contract. We offer you this freight under a new contract. If you reject our offer, we decline to load any of this freight on the Cacique. We will pay you \$47.50 for the offered 4075 tons if you accept a new contract and waive the balance of the 6200 tons; but we will withdraw even this freight thus offered, if you insist upon your contract.
4. Respondent also had notified Southern Pacific Company not to give any cargo to libelant.
5. Southern Pacific Company had placed 30 carloads (about 1100 tons) on libelant's wharf, by mistake, but had later notified libelant that these cars were stopped by respondent in transit, and had requested their return.
6. The Cacique was expected to, and did arrive at her berth in the evening of the same day.

In order to obtain jurisdiction over the absent respondent and reach the 150 carloads in the possession of Southern Pacific Company, libelant attached these 150 carloads by process of foreign attachment.

In order to reach also the cars *delivered into the custody of libelant by mistake*, libelant attached them by process in rem.

The performance of the obligations of this contract began on May 1st. On that day respondent wired to San Francisco: "We start Cacique contract today." (315) The original intention was to ship 1316 cars; but, on May 11th, it was found "to be impossible to ship this number on account of new method of crating", and the Cacique schedule was then reduced to 1288 cars. (282, 283) The whole shipment, 4075 tons, was under way by June 1st; at the time of the filing of the libel all the railroad cars carrying it had arrived in San Francisco, 30 of them having been placed on libelant's wharf by mistake of the railroad carrier. Repeatedly, during the month of June, respondent refused to deliver 6200 tons as required by its contract, and repudiated this contract on various pretended grounds. Waiving for the moment the question, whether this repudiation was, at any particular stage, an anticipatory breach of the contract, we contend that June 27th was *within* the period of time set for the performance of the contract, actual performance having commenced on May 1st, and that respondent's acts, before June 27th, constitute an *actual* breach of its contract. Among other duties, respondent was obligated to send 6200 tons from its factory to the Pacific Coast; instead of performing this duty, it sent 4075 tons, categorically refused to send more, and told libelant: You take this much, or you get nothing. It was also obligated to make a cargo of 6200 tons ready for the Cacique and to dispatch the intended cargo to libel-

ant's wharf "as fast as vessel can load"; instead of performing this duty, it stopped the goods in transit in order to compel libelant to surrender a good contract and accept in its place a new and less advantageous one. Part of the shipment had actually found its way to libelant's wharf; but notice had been given to libelant: Do not touch it, do not prepare it for loading on the Cacique under the contract of February 25th. On June 27th respondent still definitely refused to continue to perform its part of the contract. The legal effect was, to exonerate libelant from any further performance; and to give libelant an immediate right of action for his damages.

It makes no difference, whether libelant had then begun its performance or not; but in fact it had, and the Cacique was being dispatched and arrived on the same day in port.

The District Court held that, on June 27th, there had been *no actual breach* of the contract "for the reasons: 1. That the vessel was not at that time in condition to load; 2, there were 1100 pieces of respondent's freight on the wharf which libelant treated as having been delivered in part fulfillment of the contract".

We respectfully submit that the court is in error, as to both alleged reasons. As to the first alleged reason, it is clear that the duties of respondent under the contract began long before the vessel was to be in a condition to load. In fact respondent began

performance of them on May 1st and even before. These duties were to prepare a cargo in its Eastern factory, to ship it by railroad to San Francisco, and to hold it in readiness at San Francisco for loading on the vessel as fast as she could load. It was in the course of the performance of these contractual duties that respondent was guilty of several actual breaches: 1. In not preparing or shipping the contracted quantity; 2, in positively refusing to hold *any* of its goods ready at San Francisco for the performance of *this* contract. Either of these acts were actual breaches of the contract.

As to the second alleged reason, it is respectfully submitted that libelant's act in commencing an action against respondent and attaching the 1100 pieces of respondent's freight would be a very inadequate way of expressing the view that these 1100 pieces were delivered in part fulfillment of the contract. The treatment accorded to these pieces by libelant, in attaching them, is naturally more consistent with the view that the owner of the pieces *was* guilty of an actual breach of the contract, or that the goods themselves, as the originally intended cargo of the Cacique, a contracting and wrongdoing thing, were subject to an admiralty lien, on account of the actual breach of the contract.

The District Court holds that the libel was filed "before performance was due." (450)

We contend that performance under this contract was due long before the libel was filed; that, in fact,

respondent recognized this, actually commenced the performance of its obligations on or before May 1st, and continued performance thereafter, subject to the naive reservation, made on June 1st:

“We wish it, therefore, definitely understood that *if* by reason of the above and other circumstances *our plans for supplying 6200 tons for this vessel did not carry through*, we do not consider our obligation binding.” (49)

II. ON THE THEORY THAT RESPONDENT PERMITTED AN ANTICIPATORY BREACH, SUCH BREACH SUPPORTED THIS ACTION UNDER THE FACTS OF THE CASE.

1. This case went off, in the court below, on mere technicalities which, under the strict rules of procedure of the common law, would perhaps be conclusive, but which, it is respectfully submitted, have no proper place in the practice of the admiralty courts of the United States. The case was tried on behalf of respondent by a master of common law procedure, and if that procedure is to prevail in this court, the proctor for libelant is under an admitted disadvantage as to both ability, and experience. On this appeal, we believe, mere errors in dates, or questions of variance, or alleged shortcomings of counsel, will not be visited upon the client; mere technical rules and forms will be disregarded, and those rules of natural justice will be decisive to which this court referred in the case of *Davis v. Adams*, 102 Fed. 520. Assuming, for the sake of argument, that alleged technical mistakes were made by libel-

ant, which respondent claims to be waivers of respondent's breach of contract, we believe that this court, in the interest of justice, will rectify them; that it will, if it be necessary, supply deficiencies, "even suggesting to the party the means of reconstructing his case, if necessary". In the Davis case this court cites, with approval, the following language of the Supreme Court in the case of *The Gazelle and Cargo*, 128 U. S. 474:

"In the courts of admiralty of the United States, although the proofs of each party must substantially correspond to his allegations, so far as to prevent surprise, yet there are no technical rules of variance or of departure in pleading, as at the common law; and if a libellant propounds with distinctness the substantive facts upon which he relies, and prays, either specially or generally, for appropriate relief (even if there is some inaccuracy in his statement of subordinate facts, or the legal effect of the facts propounded), the court may award any relief which the law applicable to the case warrants."

Respondent could not be misled or prejudiced in maintaining its alleged defense by even an amendment of libellant's pleading in this court (if this were necessary to produce a just result); for the facts are before this court as they were before the lower court, and it is proper for us to ask the court to view them in the spirit of substantial justice prevailing in admiralty, and to decide this case on the merits of the substantial controversy involved, instead of showing the door to libellant because, perchance, it may, in the heat of the rapidly

succeeding events, have been in error as to some technicalities of mere pleadings or practice. In the Davis case this court allowed libelant, after all the evidence was in, and “at any stage of the case,” to change the libel for a tort to one based on contract. Assuming that libelant had made a mistake in attaching the 30 carloads of automobiles in its possession by process in rem, and assuming that such a proceeding was null and void, the attachment could have been set aside on motion of respondent. There were still the 150 carloads in possession of the Southern Pacific Company and attached by the U. S. Marshal to confer jurisdiction on the court and give libelant an effective remedy. Even assuming that libelant held a mistaken view of its remedies against the 30 carloads in its possession, the principle would apply that

“A mistaken view of one’s rights or remedies should not be permitted wholly to defeat a claim founded upon principles of equity and justice.”

Wiggins Ferry Co. v. Ohio & M. Ry. Co., 142

U. S. 396.

Cited in *Davis v. Adams*, supra, p. 525.

In *Dupont v. Vance*, 19 How. 173, the Supreme Court said:

“There are no technical rules of variance, or departure in pleading, like those in the common law, nor is the court precluded from granting the relief appropriate to the case appearing on the record and prayed for by the libel, because that entire case is not distinctly stated in the libel.”

When the libel was filed, the legal status of the 30 cars on libelant's wharf was anomalous and doubtful. It depended upon facts better known to respondent and its agents than to libelant. It could not be weighed and determined by libelant with the same clarity as would have been possible after the facts became known, at the trial, through the correspondence between respondent at Toronto and its San Francisco agent, and the Southern Pacific Company. This correspondence was not available at any time before the trial. The real facts were known only to respondent, while libelant was being regaled with pretended facts in pursuance of respondent's endeavor to establish *some* kind of a defense to its plain breach of contract.

2. The District Court, in its opinion, *assumes* that

“there was an *anticipatory breach* committed by respondent when it notified libelant that it would furnish only 4075 tons of freight, and insisted that the amount so furnished should not be held by libelant for the 6200 tons contracted for.” (450)

The court, however, held that, before the libel was filed, libelant had accepted a part performance under the original contract, and had therefore waived the anticipatory breach. This conclusion of the court is based upon the following premises:

That libelant treated the 1100 pieces of respondent's freight on the wharf “as having been delivered in part fulfillment of the contract” (450) *by*

filing its libel in rem against them. That by doing so libelant “elected to accept such 1100 pieces as part performance of the original contract. It could have no action in rem against them, unless delivered and received as freight under the contract.” (451)

It is respectfully submitted that the court apparently confuses the primary rights flowing from the contract with the secondary rights and obligations flowing from a breach of a contractual duty. When respondent breached the contract by anticipation, libelant at once acquired the right to damages, a secondary right created by the law to compensate for the breach of the primary right created by the contract.

In attaching respondent’s goods libelant enforced a *remedy* which had its foundation in a *breach* of the contract, and not in its continued existence. Libelant attached the goods *because* there was a *breach* of the contract, and not for the purpose of indicating that the contract was still alive. If its object had been to elect to accept performance, the method by which it signified such election would certainly have been ill-chosen. The goods had been placed upon its wharf by mistake; they were offered by respondent as a cargo under a *new* proposed contract which libelant rejected. The finding that libelant *accepted* the goods in part performance of the original contract could only be based upon a previous finding that respondent offered them in part performance of the *original* contract. But the evidence is clear and uncon-

tradicted that respondent did not so offer them; that it denied the validity of the original contract; that it attempted to impose upon libelant a *new contract*; that the goods on the wharf were *not* delivered as freight under the contract, but were offered to libelant in performance of this new proposed contract as Cacique freight. Libelant did not accept them as Cacique freight under the *proposed* contract, which it rejected; it did not accept them as Cacique freight under the original contract; but it proceeded against them by attachment, *because* the original contract had been breached by respondent. The action against the goods was chosen by libelant—not in the performance of the contract, but as a remedy for its breach. The admiralty lien arises against the wrongdoing thing and presupposes that the wrong (here in the nature of a breach of the contract) *has* been done. Respondent's original obligation was to deliver the 1100 packages in the 30 cars, together with many others, to libelant as Cacique freight under the contract; it left the 30 cars on libelant's wharf and gave notice to libelant, and to the Southern Pacific Company, that they were not to be used under the original contract, offering them, at the same time, to the Cacique as freight under another proposed contract. Libelant had a right to consider them as a wrongdoing res and to enforce an admiralty lien against them, as security for the payment of its damages.

3. But if it be *conceded that libelant was mistaken in law*, by attempting a remedy against these

goods as a wrongdoing res, the result would be that respondent would have had it in its power to have the attachment dissolved by proper motion. From the premises that *if* the goods had been delivered and received as freight under the contract, libelant would have an action in rem against them, the converse proposition does not follow. If libelant was mistaken in its remedy; if it had no right to attach the goods by process in rem, it follows, on the contrary, positively, that the goods were *not* delivered or received as freight under the contract. It is difficult to see how the mere filing of a libel in rem against 1100 packages can be considered as evidence of an election of the libelant to accept these packages as part performance of the contract of affreightment. Prima facie the filing of the libel raises the opposite presumption, viz: that the packages, or their owners, are wrongdoers in admiralty, in having breached the contract.

If the process in rem was extra-legal,

“the claimant merely waives an objection to the enforcement of it by a form of procedure against his property. He acquiesces in the court’s jurisdiction over the thing belonging to him, just as he might over his person, tho’ not properly served with process. It would certainly be sticking in the bark to compel a libelant in a suit in rem to begin a new suit in personam, notwithstanding that the claimant consented to have his rights determined in the suit in rem.”

The Susquehanna, 267 Fed. 811, 813.

It is true that libelant was always ready and willing to perform; but

“A willingness and readiness to perform, on the part of one party to a contract, without any demand on the other party who has wrongfully refused performance, or without doing anything which places the latter in a worse position, or which tends to enhance the damage which might be recovered, or deprives the innocent party of any right, or increases the rights or immunities of the wrongdoer, does not show that he has not accepted the other’s renunciation as final.”

15 *C. J.* 653.

“The willingness to perform indicates a disposition to do what is right.”

Mut. Reserve Fund L. Ass’n v. Taylor, 37 S. E. 854 (Va.).

The injured party to a contract does not lose his rights against the wrongdoer by continuing to be fair, in spite of the other’s wrongdoing.

In *Tri-Bullion Smelting Co. v. Jacobsen*, 233 Fed. 646 (1916), the Circuit Court of Appeals for the Second Circuit considered the question, whether an anticipatory breach by defendant was cured by subsequent acts of the plaintiff. The court said:

“The theory of *Tri-Bullion* seems to be that *because, in the letter, Jacobsen urged Tri-Bullion to proceed to fulfil the contract, he was thereby precluded from bringing action for an anticipatory breach, but must perform all of the provisions of the contract called for on his part.*” (648)

The court held that:

“Where a party to a contract insists that he is not under legal obligation to perform the contract, and that insistence is coupled with a continuance of his original stand and refusal to perform, the breach is plain, and he cannot successfully take refuge in the plea that he must be excused because the other party urges that the contract be carried out, failing which such other party states that he will be compelled to purchase goods in a rising market.” (649)

In the instant case:

(I) Respondent insisted repeatedly that it was not under legal obligation to perform the contract;

(II) This insistence was coupled with a continuance of its original stand, and refusal to perform the contract.

Therefore the breach was plain. Respondent cannot successfully take refuge in the plea that it must be excused because libelant urged that the contract be carried out. Nor can we see that a plea could be successfully made, that respondent must be excused because libelant, insisting upon its rights under the contract, brought an action in court and attached the goods in the enforcement of what, rightly or erroneously, it considered to be an appropriate legal remedy.

On June 27th libelant was justified, in the light of the circumstances, in taking the view that these 1100 packages, placed on its wharf by respondent as the result of the contract made between libelant and respondent, were sufficiently connected with

its steamer *Cacique* to give libelant a lien upon the packages for the enforcement of the contract, when respondent threatened to take them out of libelant's custody.

Insistence upon remedies, such as damages, and liens for security in the collection of damages, cannot be construed as an election, by libelant, to consider the contract still alive. A contract, even after breach by one party, is still alive for the purpose of giving rights and remedies to the injured party.

How could the intent to waive a breach be negatived more clearly than by the commencement of an action against the wrongdoer?

In *Marks c. Van Eighen*, 85 Fed. 853 (Circuit Court of Appeals for the Second Circuit), it was said that:

“In the present case there was sufficient evidence of an unequivocal renunciation of the contract by the defendant, and the election of the plaintiffs to treat the contract as terminated *was signified by the prompt commencement of the action.*”

The distinction between

(a) Waiver of the right to treat a breach of a contract as a discharge of the contract, and

(b) Waiver of a right to recover the damages occasioned by the breach

is discussed in “*Frankfurt-Barnett Co. v. William Prym Co.*, 237 Fed. 21 (C. C. A., 2nd Cir.) The court said (28):

“The difficulty in this case has grown out of the failure to distinguish between a waiver of the right to treat a breach of a contract as a discharge of the contract, and a waiver of the right to recover the damages occasioned by the breach. The two rights are distinct and must not be confused. In Page on Contracts, Vol. 3, § 1519, that writer correctly says that waiver of the right to treat a breach of contract as a discharge of contract liability may take place without a waiver of a right to maintain an action for damages, and the weight of authority is that it is not such a waiver. And in section 1510 the same writer states: that acceptance after breach is not a waiver of a right of action for damages is apparent when it is considered that the party not in default is often constrained by his necessities to take what he can get under his contract when he can get it.”

The case of *Marks v. Van Eighen*, above cited, was also cited by respondent in its argument in the lower court. (427, 432) The principles laid down in that case may be considered as common ground between the parties to the instant case. The court said:

“It must be considered as settled law that, where one party to an executory contract renounces it without cause, before the time for performing it has elapsed, he authorizes the other party to treat it as terminated, without prejudice to a right of action for damages; and, if the latter elects to treat the contract as terminated, his right of action accrues at once. The latter, however, must elect whether he will treat this contract as terminated, or as still existing; and, if he does not do so, his right of action for a breach can only rest upon the refusal of the other party to perform the exist-

ing contract according to its terms. The action cannot be maintained when the evidence to prove a renunciation of the contract is equivocal or indeterminate. It is enough, however, if it appears that he has distinctly signified his intention to repudiate the contract."

Adopting these principles, the following facts are proved by the evidence, showing that libelant is entitled to a decree:

First. Respondent renounced the contract without cause.

Second. The renunciation is evidenced by frequent acts and notices given to libelant, after respondent had commenced a part performance of the contract by sending from the East carloads of the cargo contracted for, and before libelant was required to do anything under the contract except to provide the steamer thereafter and to refrain from encumbering the cargo space reserved by respondent with freighting engagements. The renunciation occurred, therefore, while the contract was in progress of performance by both parties, or "before the time for performing it had elapsed."

Third. The effect of respondent's renunciation was to authorize libelant to treat the contract as terminated, *without prejudice to libelant's right of action for damages.* The enforcement of this right of action by libelant was consistent with treating the contract as terminated; indeed the termination of the contract was the very basis upon which libelant's action is founded.

Fourth. Libelant elected to treat the contract as terminated. Could a clearer expression of an election be suggested than that of advising respondent in a formal action that, because it had terminated the contract, libelant demanded the damages to which the law entitled it, and invoked the remedies which it considered to be proper in law? If it had been the intention of libelant to elect that the contract was still existing, it would *not* have attached respondent's goods. The procedure of invoking the custody of the law for them was a conclusive election, on the part of libelant, to rely upon the remedies which the law, in the opinion of libelant, provided in cases of breaches of contract by the owner of the goods.

Fifth. Libelant's right of action for a breach can safely rest upon respondent's refusal, on June 27th, to perform the contract, according to its terms. Libelant had then been definitely notified that it would receive no cargo whatever, unless it accepted a new contract proposed by respondent in the place of the contract renounced.

Sixth. The renunciation was unequivocal and determinate. Respondent had, both directly and indirectly, and very distinctly, signified its intention not to provide the 6200 tons contracted for, and in fact not to provide any cargo whatever, unless libelant would consent to rescind the original contract.

In every respect, therefore, is libelant's case supported by the principles of the Marks case.

4. A minor reason for the finding of the District Court that “the repudiation was not accepted by libelant as such” is that “*it held 1100 packages as freight delivered in pursuance to the contract after such repudiation.*” (452)

In this connection, the court cites from the testimony of Mr. Carter, libelant’s manager, on his cross-examination:

“Q. So that you knew at that time that the Ford Motor Company had actually delivered 1100 packages, or thereabouts, of the freight which you in this telegram of the 26th of June demanded it should deliver?

A. Yes, but also knew it was *delivered by mistake.*

Q. That is, it was not intended as freight for the steamer?

A. No, *it was not the intention of the Ford Motor Company to give us that freight.*” (451)

This testimony is corroborated by the facts as they appear from the correspondence in evidence.

The cross-examination then proceeded as follows:

“Q. And it was not received by you as freight?

A. It was received as freight.

Q. It was received as freight?

A. It was received as freight.

Q. Then you had it as freight?

A. We did.” (451)

Of course the purpose of this clever cross-examination was to create the inference that libelant held the 1100 packages as freight in *pursuance of the contract*, and the libelant, by having the packages

on its wharf, was keeping the contract alive; but it is submitted that this testimony is consistent with the fact that the packages were held "as freight" to be used in mitigation of damages, especially as the witness added:

"We naturally, when we placed our libel, libeled everything we could find of Ford." (452)

In *Sperry & Hutchinson Co. v. O'Neill-Adams Co.*, 185 Fed. 231, (C. C. A., 2nd Cir.) a trading stamp contract bound plaintiff to pay for stamps purchased during one month on or before the 15th of the succeeding month. On January 15th it was manifest that defendant had broken the contract and intended to continue doing so. Plaintiff continued to buy stamps under the contract, and defendant contended that plaintiff waived its right to avail of the breach.

The court held, in the language of Judge Lacombe:

"It is next contended that plaintiff waived its right to avail of the breach, because it continued buying stamps under the contract after the injunction was issued on December 18th. We find no force in this contention. The breach was a continuing one. What defendant would finally do was not certain until the injunction was made permanent. It might make some arrangement * * * which would result in a withdrawal of the injunction suit. *Until it was definitely known what the end would be plaintiff could go on without waiving any of its rights.* On January 15th and every succeeding day there was a new breach of the contract."

So in the instant case. The breach was a continuing one. Libelant had been notified repeatedly that respondent would *not* perform *this* contract. The willingness of libelant, before it was definitely known what respondent's final decision would be, to carry out the contract, in case respondent should change its mind and perform on its part, did not deprive libelant of its rights. Much less did libelant lose any of its rights by the seizure of the 1100 packages as security against the damages it might expect to recover in its action for the breach.

On June 23d and every succeeding day, there was a new breach of the contract.

The following cases involve analogous points:

Where one party to a contract seeks to avoid compliance therewith, the other party may, without waiving his rights, make an honest effort to induce compliance.

Louisville Packing Co. v. Crain, 132 S. W. 575 (Ky.).

Where defendant informed plaintiff that defendant could not and would not do what defendant had contracted to do, plaintiff's right of action for breach of the contract then accrued, and the breach was not waived by plaintiff's subsequent ineffectual demand for commencement of performance.

Bologh v. Roof Maintenance Co., 112 N. Y. S. 1104.

No argument is required to show that the letters and conduct of respondent constitute a repudiation

of the contract. We *have* shown that libelant accepted them as such.

In order to prove, now, that libelant, on its part, had performed all the terms and conditions of the contract when the libel was filed, it becomes necessary to consider the construction of the contract.

III. CONSTRUCTION OF THE CONTRACT.

The original controversy turned about the construction of the following clause:

“*Shipment*: Per American S. S. Cacique June loading; when vessel is closer at hand, will advise you more definitely as to exact loading date.”

Respondent contends that this contract called for a “*loading and clearing in June*,” and that the contract was “*inoperative* by reason of the fact that your S. S. Cacique has already taken out a clearance for July 5th.” (51)

In order to be able to detach the words “June loading” from the word “Cacique,” and thus to give an independent meaning to the words “June loading,” respondent has introduced a comma between the word “Cacique” and the words “June loading” in the contract; but the contract signed by the parties does not contain this comma.

Libelant, on the other hand, contends that, in the light of all the circumstances, as they will appear hereafter, the words “*Cacique June loading*”

were intended by the parties to the contract to signify the expected *second* loading of the Cacique after the date of the contract, and to exclude the *first* loading of the Cacique after the date of the contract, which was expected to be in March.

“In every case the words used must be *translated into things and facts* by parol evidence.” (*Doherty v. Hill*, 144 Mass 465.) The court could not know, as a mere matter of interpretation or construction of the language used, what the word “Cacique” meant in the situation of the parties *at the time of the making of the contract*, nor what the words “Cacique June loading” were intended by the parties to express. The evidence in the record which places the court in the situation of the parties shows: *first*, that, on the day when the parties made the contract, they knew that the next loading of the steamer Cacique at San Francisco which was expected to be in March would not suit respondent’s plans, and their contract, consequently, contemplated the second loading after that day; and *second*, that after the making of the contract, respondent itself confirmed this understanding frequently by its own acts and conduct. The practical interpretation given to the contract by respondent is of the greatest value in this connection.

a. **The prima facie meaning of the language of the contract.**

The contract shows on its face that *no exact date* is stipulated for the loading or shipping of the cargo; that, on the contrary, the loading date is ex-

pressly left indefinite. Libelant undertakes to “advise you more definitely as to exact loading date,” “when vessel is closer at hand.” In other words, libelant says: I cannot now give you the exact loading date. “Date” includes not merely the *day* of the month, but also *the month*.

Shipmen v. Forbes, 97 Cal. 572;

Heffner v. Heffner, 20 So. 281 (La.).

Prima facie, therefore, the words: “will advise you as to exact loading *date*” mean: “will advise you as to exact *day and month*” when the Cacique will load. That the parties in fact intended what their language *connotes prima facie*, is confirmed by the circumstances of the transaction, both at the time of the making of the contract, and by the practical construction which respondent gave to it down to the eleventh hour, when its advisers opened the door for the introduction of a technical excuse for its breach of the contract.

Had the parties intended that loading in June should be *warranted*, they would have followed the usual custom of adding a “cancelling date”, providing that, “if the ship is not ready to load on or by a certain date, shippers would have the option of cancelling.” (181)

Respondent’s attempt to, first, detach the words “June loading” from the word “Cacique and to, then, give a literal meaning to the words “June loading,” recalls the warning language of the Supreme Court in *Reed v. Insurance Company*, 95 U. S. 23, that

“a rigid adherence to the letter often leads to erroneous results, and misinterprets the meaning of the parties.”

In this connection the following words of the same court, in the same case, *are a propos*:

“That such was not the sense in which the parties in this case used the words in question is manifest, we think, *from all the circumstances of the case*. Although a written agreement cannot be varied (by addition or subtraction) by proof of the circumstances out of which it grew and which surrounded its adoption, yet such circumstances are constantly resorted to for the purpose of ascertaining the subject-matter and the standpoint of the parties in relation thereto. Without some knowledge derived from such evidence, it would be impossible to comprehend the meaning of an instrument, or the effect to be given to the words of which it is composed. This preliminary knowledge is as indispensable as that of the language in which the instrument is written. A reference to the actual condition of things at the time, as they appeared to the parties themselves, is often necessary to prevent the court, in construing their language, from falling into mistakes and even absurdities.”

In the *Reed* case an insurance risk was suspended, while the vessel was “at Baker’s Island loading”, and the question was: Does this mean: while the vessel was “at Baker’s Island *for the purpose* of loading”? or does it mean: while the vessel was “at Baker’s Island *actually* loading”? The court held that a strictly literal construction *would* favor the latter meaning, but rejected that meaning in the light of evidence showing the circumstances.

In the instant case the construction for which we contend is in accordance with the *prima facie* meaning of the words: "Exact loading date". We do not ask the court, as was done successfully in the Reed case, to *reject* the strictly literal meaning, but contend that the words: "per Cacique June loading—will advise you more definitely as to loading *date*" have the same meaning, whether interpreted literally, or in the light of all the surrounding circumstances, viz: that the shipment should be made per S. S. Cacique at her expected June loading, the second loading after date, in this port: that the exact loading date could not be definitely determined so far in advance, but that the loading was expected to be in June.

Before entering upon a review of the evidence on this subject, we would point out the proper and usual method of expressing an intention to make the arrival of a ship at an exact date a condition precedent to furnish a cargo:

Abbott, on Shipping, (14th Ed.), after showing the disinclination of the courts to construe such agreements as conditions precedent, says:

"The merchant, however, may make the arrival of the ship by a particular time * * * a condition precedent to furnishing a homeward cargo for the ship, *by special and particular proviso* * * * and this is the proper method to be adopted, in order to give effect to such an intention on the part of the merchant. For although the contract by charter-party is in general of that kind which lawyers call recip-

rocal, that is, mutually obligatory upon each party; nevertheless, the parties may by particular clauses render it obligatory upon one, and optional to the other * * *

The author thereupon cites a case, in which the proviso was: ‘That if the said ship should not have arrived at Wingaw aforesaid by the 1st day of March next ensuing, *then and in such case it should be in the option of the merchant either to load the said ship or not.*’

An intention to make any particular stipulation a condition precedent should be clearly and unambiguously expressed.” (*Abbott, Shipping*, 14th Ed. pp. 417, 418, 423)

Parsons, Maritime Law, Book I, p. 272, sums up the proposition, “as applied to contracts relating to shipping:”

“Indeed, it may almost be said, that there is a *presumption of law, for there is certainly a strong disposition of the courts, against such a construction of a covenant or promise as would make it a condition precedent.*”

It should be noted, therefore, that a principle of construction which might be suitable to a common law case on *sales* has no application to a contract relating to *shipping*.

If the *particular time* when the Cacique should be ready had been intended as a substantial part of the contract, the parties would have stressed this feature by a proviso in the nature of a cancellation clause. In the instant case the *agency or instrumentality* by which the shipment was to be made is stressed, as indicated by the words “*ship-*

ment per”. The *time* of the shipment is not only *not* made specific, but left expressly indefinite in two ways: first, by giving parties a margin as to “the exact loading date”, and second, by giving respondent another margin for the delivery of the cargo by providing that it need not be delivered on any specified day, but that respondent could extend the time for delivery by paying an agreed sum per day.

The *prima facie* effect of the language used in the contract is, therefore, that the parties did *not* intend to make the exact time of the shipment a substantial requirement.

b. The circumstances surrounding the contract.

Even if the *prima facie* effect were in favor of the construction on which respondent relies,

“The subject-matter of the contract, its purpose, and *the situation of the parties*, are material to determine their intention and the meaning of words used. When these are ascertained, *they must prevail over the dry words used.*”

Hull Coal Co. v. Empire Coal Co. 113 Fed. 256, 260 (C. C. A., 4th Circ.)

What was the situation of the parties? It is shown by the testimony of Mr. Moore, Mr. Carter, and Mr. Davis, the three parties who negotiated for and made the contract in February.

Mr. Moore, Traffic Manager for libelant at the time, testified substantially:

Mr. Davis, for the Ford Motor Company, called on him about the freighting of 6200 measurement tons of automobiles to New Zealand and Australia. There was then a scarcity of tonnage due to the European war; but libelant told respondent's agent, Mr. Davis, that the steamer *Cacique* might be appropriate for the shipment; that the *Cacique* was then on a voyage from the Atlantic to San Francisco and would stop on the way to take on a cargo for Vladivostok; that she would then arrive at San Francisco and discharge her cargo, would load cargo at San Francisco for Vladivostok, then would proceed to Vladivostok and discharge her cargo there; then load at Vladivostok, and one or more Oriental ports for the return voyage to San Francisco; that, after her return voyage to San Francisco (this being then her *second prospective* arrival there) she could be made ready for this automobile cargo. (115-121)

"I told Mr. Davis that she would be due in San Francisco for late March loading for Vladivostok, and that, given a favorable voyage, her *probable* date for returning for loading at San Francisco for these automobiles would be some time in June." (122)

"They had been trying very hard to find space for this particular lot of freight, and that they would very much appreciate anything which could be done by us to move it from San Francisco *within a reasonable time after it arrived here.*" (123)

"As a matter of fact, it would be impossible at that time, with the vessel's commitments

ahead of her, to guarantee that she would arrive here in June.” (123)

“The COURT: Q. Did you tell Mr. Davis that, that it would be impossible to figure definitely? A. Yes.” (124)

“Nobody would be in a position to make a positive statement about the date of arrival here or elsewhere of a tramp steamer of that character.” (149)

“Q. In those conversations between you and Mr. Davis, was anything said at all about June loading? A. Probable June loading.” (Cross-ex. 151)

“A. The understanding was that the cargo was to be lifted when the Cacique returned from Vladivostok, and *we designated that voyage as her June loading in San Francisco, to distinguish it from her March-April loading, when she left for Vladivostok.*” (152)

Mr. Carter, Assistant Manager for libelant at the time when the contract was made, testified substantially:

“He (Davis) wanted to know, if it was not possible for us to divert one of our steamers from the regular trade, in order to take care of this business for them, to carry this cargo from San Francisco to Australia.” (183)

“A. He wanted a steamer capable of carrying the entire amount of 6200 tons, and was particularly anxious that the steamer *should not be too early.*

Q. Did he give any reason why he did not wish the steamer too early?

A. They were crowded in getting out automobiles at their factory; the discussion at that time was the possibility of this cargo not being ready in case a vessel made early June.” (184)

Mr. Davis, who, as head of the Traffic Department of Ford Motor Company of San Francisco, made the contract with libelant on behalf of respondent, was called as a witness for respondent and testified as follows:

“There was a map on Mr. Moore’s wall, in his office, which had all the ships on it, of their company, and the location of each, and on this map these ships were moved from day to day, scheduled, more for his information, so that he could *presumably tell* where the ships would be or destined. But there was nothing definite, as I remember, arranged upon that day, that, first meeting.” (326)

“We were looking over the map, and it seemed that the Cacique was about the only boat that we could *figure* on which would arrive here for June sailing. As I recall, she was then on her way from the East Coast to this port, and then for Vladivostok, and *her round trip would bring her back into this port about June.*”

On cross-examination this witness stated that he had a conversation with counsel for libelant, in the presence of Mr. Moore and Mr. Florentine, at which the following occurred:

“Q. Mr. Davis, do you remember that you told me in the presence of Mr. Moore and Mr. Florentine on that occasion that there was one feature that you remembered distinctly, namely, *that no exact time for the arrival of the Cacique was intended to be stipulated, on the ground that it was impossible, so long ahead, for any steamship man to fix any time?*

A. For the arrival of the steamer?

Q. Yes. A. *I believe I did.*” (333)

“Q. Do you remember that you yourself, suggested that since you knew that two voyages would intervene between the 25th of February and the expected arrival of the Cacique, that a great many things might happen to steamers on voyages, and, therefore, it would have been impossible to state when that steamer would arrive in San Francisco, that it could only be approximate?

A. I remember something about stating that there might be many things happen to a steamer while it was in transit.” (334)

“Q. Don’t you remember that you said that no steamship man could possibly foretell four months ahead the time of arrival of a steamer at any particular time, and that for that reason it was not intended to make any contract for her arrival on any particular date?

A. I don’t remember of making such a broad statement as that, about being a steamship man.” (334)

Mr. Florentine testified:

“As I remember it, he said exactly * * * that he did not think that any steamship man would be in a position to definitely fix a date for the arrival of any vessel four months ahead, particularly in view of the voyage the vessel had to make.” (357)

Another significant circumstance which leads to the same result, viz.: that it was *not* intended by respondent to secure the benefit of a warranty that the Cacique should make a June loading, is the following:

Assuming that respondent *had* intended such a warranty, it would certainly have impressed its importance upon its San Francisco agent in letters

or telegrams defining his authority or instructions. The existence of such communications would be a certainty, *if* the intention to secure a warranty had existed. How easy it would have been for respondent to remove all doubt from this fundamental proposition by producing such letters or telegrams *sua sponte*! Indeed, if the intention of respondent *had* been in conformity with its present claim, it would have been anxious and eager to introduce in evidence respondent's instructions to Mr. Davis showing that a substantial limitation of his authority to make the contract was that the time for the loading of the Cacique should be fixed definitely and absolutely. But what occurred at the trial? Not only did respondent not produce *sua sponte* the evidence which would have thrown light upon the question, but, when libelant, to ascertain the truth, took the chance of hurting its personal interest and called for the production of the letters and telegrams containing Mr. Davis' instructions, libelant was met with the astonishing information that the records of Mr. Davis' office had been destroyed between the time of the making of the contract and the time of the trial, "so I cannot produce what they have destroyed, but I have a letter here that was given to me in 1916." (179) The instructions from respondent to Davis would have disclosed, *either*, that it made no difference to respondent, whether the Cacique would load in June or later; *or*, that he *must* make a contract containing a warranty that the Cacique should load in

June. The inference which it is legal to draw from the non-production of the evidence is, that the instructions would have shown that it made no difference to respondent whether the Cacique was loaded in June or July.

The circumstances surrounding the making of the contract show therefore, both directly and by inference, that it was *not* in fact intended by the parties to make a contract fixing the prospective loading of the Cacique at any definite time.

It is also proper to consider that, in the very nature of things, no experienced shipowner would have tied up a large and valuable freight carrier in the busy days when this contract was made, by a one-sided engagement which the merchant, at his option, could cancel after the vessel had arrived at the loading place.

c. The practical construction given to the contract by the respondent after it was made.

Three days after the making of the contract (February 28th) respondent wired to Mr. Davis:

“We need about 4000 tons in addition to ten thousand arranged, *say for late June early July sailing.*” (269)

This indicates that it was not the practice of respondent to make the exact time of loading a condition or warranty in its freighting contracts.

On March 2nd respondent wired:

“Understand you have arranged 6200 tons
* * * this is all we will *need to end of July.*”
(269)

On March 3rd respondent wires:

“We need only about 6000 tons in addition to what we arranged and would like this *for June-July sailing.*” (270)

On March 4th Mr. Davis wrote to respondent:

“From subsequent wires it would seem that you have all the space required up to *June and July* and will need no more until *late July or early August.*” (271)

These communications show that respondent's freight engagements were customarily made so as to prevent the fixing of an exact time limit for loading; for indeed, it was the interest of respondent *not* to bind itself to a delivery of its goods to vessels at San Francisco on a fixed date. The uncertainty of the time required for railroad transportation of huge shipments from the factory to the distant loading port was only one of the decisive reasons why respondent would naturally have avoided a definite time obligation.

On March 28th respondent wired to Mr. Davis:

“You state 6200 tons * * * We will be able to give 4284 tons * * * Do not reserve any more space *until July*; (272)

indicating that respondent expected to have automobiles ready for July shipment to Australia, but that, if it was tied down to a June shipment, it could not furnish to the Cacique the tonnage contracted for, but only about two-thirds thereof. It *could* fulfill its contract, if a *July* loading was made, but not if an earlier shipment was required.

Mr. Davis receives this information “with considerable surprise” (274); he feels “that when it is taken up with them, they will desire to cancel our contract entirely.” (274)

Thereafter many expectations were entertained and attempts made to make up the shortage in the cargo.

On April 4th respondent “expects certain additions from Australia which will no doubt bring our specifications up to the required amount.” (276)

In an endeavor to make up the deficiency, respondent made a contract on May 5th with Henry W. Peabody, for 542 tons of automobiles to supply part of the Cacique cargo. In that contract the Cacique is described as “loading at San Francisco *about July 1st*”. Is not this a conclusive admission that, according to its own construction, a “*loading about July 1st*” satisfies the contract with libellant? Would not a loading on the 1st, 2nd, 3rd, or 4th of July have satisfied the Peabody contract? Is this consistent with the contention that a loading after June was a breach of a warranty of the contract in suit?

That “June or *early July*” loading was considered by libellant and respondent as a compliance with the contract is also confirmed by the letter of the Southern Pacific Company accompanying some railroad shipments, copies of which were sent to

both libelant and respondent, and which read: "All for the S. S. Cacique *June or early July.*" (175)

On May 27th Davis informed respondent that the Cacique would sail *about July 10th.* On the same day he wrote to respondent: "We intend to go on and secure cargo if it is possible." He was the party who made the contract. He understands on May 27th that the contract is valid, although the Cacique would sail about July 10th.

On May 31st Davis advises, with reference to the attempt to persuade the Union Steamship Company to release some cars of automobiles for application to the Cacique contract, that the said company refuses to do so, but that "any cars here *after July 1st* they will give to Grace". (294) Is this not again an admission that, according to the understanding of Mr. Davis, cars arriving after July 1st do comply with the contract?

On May 31st respondent wrote, after having been advised that "Cacique will sail about July 10th" (291):

"It is a further *surprise* to us to note that up until Saturday last we were still led to believe that the Cacique would sail on the 14th of June. This *was* the latest information from you. We had to do considerable wiring to get any different information.

This is not in the nature of a complaint, but indicating only the handicap such lack of information places us under at this end. *This information relayed to Australia some time ago would have allayed* a considerable fear on their part that shipments would arrive piling up

one on the other causing congestions to a considerable degree.” (295)

This date (May 31st) is an important date in the evolution of this case. Before this time respondent had been sweating blood because the Cacique would be ready *sooner* (June 14th) than respondent could possibly be ready with its cargo. Now respondent has learned that she would not be ready until nearly a month later (July 10th) and respondent draws a deep sigh of relief, because the fear of the Australian customers would be allayed. A *late*, a July shipment and sailing is what respondent desires on May 31st, and it welcomes information to the effect that the Cacique would not arrive as early as she had been expected to arrive. (Incidentally this evidence shows also the falseness of the allegation in respondent’s answer: that respondent had “sold a large quantity of automobiles for delivery in New Zealand and Australia, *actual* shipment of which by water was *required* to be made during the month of June”. (35) It is upon this flimsy and untrue assertion that respondent founds the necessity for a “June loading” warranty in the contract.)

The turning point in the evolution of respondent’s theories comes in the first part of June. As late as June 1st Mr. Davis writes to respondent:

“However, they (Union Steamship Company) are willing to allow us to have any cars *which might arrive later than July 1st*
* * * which we can turn over to Grace & Co. for the Cacique.” (297)

On June 1st therefore, the maker of the contract still thinks *that cars arriving from the East later than July 1st would satisfy the contract*, and respondent continues to work on this theory with possible suppliers of the deficiency in the cargo.

As late as June 3rd respondent wires to Davis, referring to invoices and bills of lading covering automobiles:

“which we expect to go forward on the following steamers: Coolgardie June 3d Waimarino June 30th. *Cacique July 12th.*” (309)

On June 13th Mr. Davis wrote to respondent:

“Regarding the change of dates *Cacique* sailing, information has come to us which had not previously been made public to the effect that the *Cacique* had met with an accident after leaving Vladivostok, Russia, which necessitated repairs, and again it was necessary to put her on the ways at Hong Kong which further delayed the boat and we were only recently informed of this change, although the movements of the boat had led us to believe that it would be much later than the middle of June for her departure, and *it is now our hope that she will even be as late as the tenth of July* as we wired recently.” * * * “We sincerely hope that you will be able to fill the space with your own cars rather than let it go to any other concern for a lower figure.” (308, 309)

When the prospects of supplying 6200 tons became desperate, Mr. Davis, on June 8th, makes a discovery and wires to respondent:

“Our contract reads June loading. *Does not their failure to complete loading our cars in June automatically cancel contract?* That is opinion here. Unless you intend reshipping Normandy cargo we think best to stand firm on June loading.” (299)

The idea is: If the Cacique arrives too early for your purposes, stand firm on the point that the contract calls for an earlier loading. Incidentally this would have the advantage of getting rid of a contract which, from the beginning, did not appeal to the Eastern principals, as they could have secured cheaper rates with other lines. “The rates are going down” (394) The Union Steamship Company had refused to give up the 1500 tons required by respondent for its Cacique contract. Respondent had not the cargo to fill the engaged space; it could not fill it by other shippers’ cargo without suffering loss. A threatened congestion of cars in Australia was another difficulty confronting respondent; it became apparently necessary to cut down even the 4075 tons on hand. These difficulties were multiplied and increased by the prospect of a too early arrival of the Cacique. They could be healed only by a sufficiently late arrival of the Cacique. When she, in fact, arrived too soon for respondent’s convenience, the discovery of a method of salvation became a necessity. This accounts for respondent’s sudden change of front. Why, it was so easy! And now the contract is “automatically cancelled” on the *pretended ground that the Cacique was too late, when the real ground*

was, that she was too early. The “June loading” theory was, indeed, an eleventh hour escape from a difficulty. The inventor of the theory had, apparently, some scruples about his suggested remedy; for he recommends it only as an extremity, viz.: “unless you intend reshipping Normandy cargo”. Mr. Davis feels that it *would* have been nicer to reship this last cargo on the Cacique and to avoid the breach of a contract made. (Incidentally the re-shipping of the Normandy cargo suggests, again the shipping on the Cacique of a cargo, which could not possibly arrive until after July 1st, so that the effect of the suggestion is: Unless you are in position to ship *after* July 1st, cancel the contract on the ground that the steamer should have arrived in time to load *before* July 1st.)

This is quite in line with respondent’s notice to libellant that

“*if our plans for supplying 6200 tons for this vessel do not carry through, we do not consider our obligation binding.*” (49)

“*Our obligation*” was, to supply 6200 tons for this vessel. It is binding (respondent says), *if* our plans for supplying the 6200 tons carry through. but we do *not* consider it binding, if our plans do *not* carry through. Verily, Mr. Pecksniff had, by this time, degenerated into a bold and desperate commercial buccaneer. Indeed!

“I will acknowledge my obligation, if it suits me to perform it; but I will not consider it binding, if my plans for performing it mis-carry!”

When the case had reached this stage, it passed into the hands of the legal advisers. Of course no lawyer could for a moment recognize the validity of the naive layman's excuse for not considering his obligation binding, and it became necessary to find the "legal excuse". This accounts for the birth of the theory that *time* was of the essence of this contract; that the Cacique had missed her time in June, and that, consequently, this respondent could, properly, in the eleventh hour, discontinue the performance of a contract which, by its previous conduct, it had often admitted to be as binding in July as well as in June. It is, of course to be presumed that the legal advisers did not, at the time of the creation of the "June loading" excuse, know that respondent, by its previous correspondence and conduct, had given a construction to its contract which is bound to embarrass the "legal excuse."

- d. The time of delivery provided in the contract proves that time of loading was not intended to be of the essence.

The contract provides:

"*Delivery*: To be delivered alongside steamer at San Francisco as fast as vessel can load, otherwise shippers to pay demurrage."

There is no stipulation here, that delivery of the cargo, by respondent, should be in *June*. The only stipulation is that it shall be "*delivered as fast as vessel can load*." Even if respondent should not

deliver “as fast as vessel can load”, the penalty provided is not, that the contract should be automatically terminated, or even that libelant should, in that event, have an option to cancel it. On the contrary, if respondent should not deliver “as fast as vessel can load,” it is stipulated that the shipper should pay demurrage at a fixed rate per day: if he delayed the vessel one day, \$3000; if he delayed her two days, \$6000, etc. The shipper could buy the right to delay her. He had the *right* to keep her waiting for cargo so that her loading might not be completed on July 1st.

Is such a contract consistent with a contention that the contract is “automatically cancelled” with the beginning of the first day of July?

IV. THIS ACTION SHOULD BE SUSTAINED, EVEN ASSUMING THAT IT WAS PREMATURELY BROUGHT.

The District Court held that the libel did not sustain an anticipatory breach on June 27th, when the libel was filed. The facts show that, on that day, there had been a succession of anticipatory breaches, which had its climax in the notice received from the Southern Pacific Company in the forenoon of June 27th that “none of the cargo at present on hand booked steamer Cacique” would be delivered, and we therefore contend that the court’s ruling is erroneous.

We furthermore submit that, granting for the moment that the libel was prematurely filed, and

that facts occurring *after* the libel would sustain the allegations of the libel, the effect of such a condition would be that, in admiralty practice, the libel should be sustained. The District Court recognizes this rule of admiralty, but apparently holds that, in this case, an *exception* to the admiralty rule should be made for reasons stated as follows:

“Where, as here, performance was not due at the time the action was commenced, where performance of at least a substantial portion of the contract was offered by respondent, and where there is a grave question, whether libellant itself was or would be in a position to carry out its portion of the contract, however willing to do so.”

We submit that these reasons are all founded upon erroneous assumptions and are, therefore, not valid.

That “performance was not due at the time the action was commenced” is not a peculiar feature of this case, if it be viewed as being founded upon an anticipatory breach; on the contrary, performance is usually not due, in cases of anticipatory breach, when the action is commenced. Furthermore, the performance which was “not due at the time the action was commenced” can only refer to the performance by libellant; as to performance by respondent, it had been long due and was so recognized by respondent, when it prepared part of the contracted cargo in May and sent it over the railroads to San Francisco in June. Not only was it due, but unequivocal notice had been given by

respondent that it was only a part performance which must be accepted by libelant as a complete performance. The complete performance was due and overdue, and respondent had positively renounced full performance of the contract, while, at the same time, libelant refused to accept the part performance as a compliance with the contract.

The second reason, viz. that “performance of at least a substantial portion of the contract was offered by respondent” is equally insufficient to take the instant case out of the usual rules of admiralty. At best the offer to perform a substantial part of a contract is *not* a performance of the contract; but surely the facts of this case do not recommend respondent to such tender consideration of a court as should result in resolving a question of discretion in its favor. Respondent informed libelant, with whom it had made a contract:

“I will not do what I contracted to do, but I will do part of it, provided you release me from the rest of my obligations; and if you do not like this, I will not fulfill any of my obligations.”

Such an act should not recommend respondent to the favorable consideration of the court.

The third reason, viz. that “there is a grave question, whether libelant itself was or would be in a position to carry out its portion of the contract” stands on not better a foundation. Libelant had, at the time of the filing of the libel, nothing to perform except to make the Cacique ready for the

loading under this contract. Whether or not libelant has done this, may be granted to be “a grave question.” The answer to this question depends upon the construction of this contract—a subject which we have treated in this Brief. If it is a grave question, it should be decided by the court. We believe that this court will agree with us that libelant *was* in a position to carry out its portion of the contract. But if it be assumed that it was not, the result of such inability might constitute an independent ground for dismissing the libel, but it would not be a sufficient ground for holding that if this action was prematurely brought, libelant should not receive the benefit of the admiralty rule applying to such actions.

The colloquy between the court and libelant’s counsel, referred to in the opinion of the court, ended in the admission by counsel: “I will rest on the breaches down to the time of the filing of the libel.” (454) We realize that counsel, confident that libelant’s case was sufficient without the benefit of the application of the liberal admiralty rule, waived a right which, as after-events proved, might have been of value to his client’s cause. We still believe that the facts shown before the filing of the libel were abundantly sufficient to support a cause of either actual or anticipatory breach of contract against respondent. If, however, this court should require the weight of any facts which occurred after the filing of the libel, for the purpose of sustaining the libel, libelant hereby with-

draws, for the purposes of this trial de novo, the admission or waiver contained in the colloquy and claims the full benefit of the liberal admiralty rule.

It is "the settled law as to the effect of appeals in admiralty" that an appeal vacates altogether the decree of the District Court, and that the case is tried de novo in the Circuit Court of Appeals.

Duche v. John Twohy, Adv. Op. 1920-21; p. 388.

This rule is applied even to the extent that a cause need not be sent back to the District Court to take new testimony, but evidence can be taken in the Circuit Court of Appeals.

The St. Johns, N. F. 272 Fed. 673.

It follows from this that this court may consider testimony, the benefit of which was waived by a party in the lower court, and that this court may use, if necessary, any facts appearing in evidence which will sustain the libel on a theory of either actual or anticipatory breach, even though the facts occurred after the filing of the libel.

It would be immaterial even if a theory which the libel is wide enough to cover had never been thought of when libelant pleaded.

Bashinsky Cotton Co. v. Sunset Lighterage Corp., 272 Fed. 120.

It is respectfully submitted that the decree of the District Court—based as it is upon technicalities

for which there is no room in admiralty practice—should be reversed, and that a decree should be ordered in favor of libelant upon the merits of the cause as the evidence shows therein.

Dated, San Francisco,
October 5, 1921.

ANDROS & HENGSTLER,
LOUIS T. HENGSTLER,
F. W. DORR,
Proctors for Appellant.

No. 3721

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

W. R. GRACE & COMPANY
(a corporation),

Appellant,

VS.

FORD MOTOR COMPANY OF CANADA, LTD. (a
corporation) and ROBERT NETTLEFOLD,

Appellees.

Upon Appeal from the Southern Division of the United States
District Court for the Northern District of California,
First Division.

BRIEF FOR APPELLEES.

W. F. WILLIAMSON,
Proctor for Appellees.

FILED

OCT 18 1921

F. D. MCNULTON,
CLERK.

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VS.

FORD MOTOR COMPANY OF CANADA, LTD. (a
corporation) and ROBERT NETTLEFOLD,
Appellees.

Upon Appeal from the Southern Division of the United States
District Court for the Northern District of California,
First Division.

BRIEF FOR APPELLEES.

The first twenty-four pages of the Brief for Appellant are devoted to what is termed a "Statement of the Case". The statement, however, does not state, or attempt to state, all of the facts. There are many quotations from letters and telegrams, but, as may be seen by reference to the cited pages

of the record, such quotations are almost universally incomplete, and in some instances sentences are broken and detached portions thereof only are quoted. Nor are all the letters and telegrams quoted or referred to. The mass of detached and imperfectly quoted matter, is interspersed with argument with the result, we believe, that the Court can get, therefrom, no correct understanding of the case presented on this appeal. We shall, therefore, briefly state the facts of the case before directing our attention to the questions argued by appellant. In the course of the argument, we shall have occasion to refer to the correspondence, which renders further comment thereon unnecessary at this time.

Statement of the Case.

In February, 1916, respondent was making large shipments of automobiles to Australia and New Zealand and was contracting ahead for carrying space on steamers to meet its requirements by months. On February 23rd, it wired to the San Francisco office of the Ford Motor Company, a separate corporation, as follows:

“Have arranged with Illinois Central representing Hind Rolph for Union Steamship Co. for 4000 tons and with Southern Pacific it is likely for 2200 tons April and May; would like another 4000 tons May and June sailing; offer \$47.50”.

(Apostles on Appeal 361.)

L. C. Davis, Traffic Manager of the Ford Motor Company at San Francisco, began negotiations with libelant and on February 24, 1916, wired respondent as follows:

“If you can take 6200 tons for early June can close with Grace Company same rate Wellington and Sydney or Wellington and Melbourne”. (265.)

Respondent under date of February 25th, wired Ford Motor Company at San Francisco, as follows:

“Accept Grace offer 6200 tons confirm advising names and dates of sailing”. (265.)

On the same day, February 25th, libelant prepared the contract of affreightment sued upon in this action and which is attached as an exhibit to respondent's answer (Exhibit “A,” Apostles on Appeal, page 46). This contract was accepted by Mr. Davis, acting for respondent on that day, and on February 27th, he wired respondent “Have signed with Grace American steamer Cacique about June 24th. Union advised Illinois Central made firm offer your account 6000 tons at \$52.50” (265).

On March 1, 1916, Mr. Davis wrote respondent confirming the telegram last mentioned, and enclosing a copy of the contract of affreightment. In this letter, the sailing date of the Steamer Cacique was given at “about the 14th of June” (268). In some manner, this letter and the contract, enclosed with it failed to reach respondent's office, and a copy thereof was forwarded from San Francisco about April 3, 1916 (272-273-276). In

the meantime, other commitments had been made by respondent for shipments both from San Francisco and from Montreal.

On April 3, 1916, and again on May 1st, respondent advised the Ford Motor Company of San Francisco that, owing to non-receipt of the contract with Grace & Company, and, being without knowledge of its terms, it had made "certain space engagements for May", etc., which took up a portion of the 6200 tons and, therefore, respondent had but 4284 tons for shipment on the Steamer Cacique. The letter continues:

"However, we expect certain additions from Australia which will no doubt bring our specifications up to the required amount".

The record contains a number of letters which passed between the respondent's office in Ontario and the San Francisco office of the Ford Motor Company, in respect to this tonnage.

On May 1, 1916, respondent wired Ford Motor Company at San Francisco that 5658 tons would be sent forward for shipment under this contract. On that and successive days in May, shipments were made on ocean loadings to San Francisco for movement on the Steamer Cacique and respondent contracted with Peabody & Company for 542 tons which it was then thought would make up the complete tonnage required under this contract (280-283-284). These shipments, however, made a total of only 4575 tons. When respondent discovered this shortage and while the shipments were en route to

San Francisco, respondent, on May 25, 1916, directed Traffic Manager Davis of the Ford Motor Company of San Francisco to borrow 1500 tons from shipments previously made to San Francisco for transport on the Union Steamship Company's steamers, agreeing to replace them with later shipments (289). Respondent advised libelant of these conditions, and of the efforts being made to borrow the 1500 tons from the Union Steamship Company's shipments. The 1500 tons were then in San Francisco awaiting shipment on the Union Steamship Company's steamer, but there was some uncertainty on the part of respondent, as to whether the Union Steamship Company would be able to meet its obligations as to the movement of these shipments. Efforts to borrow the 1500 tons failed on June 1st, which still left respondent short 1500 of the 6200 tons contracted for in the contract in suit.

On June 1st, respondent wrote libelant of the existing shortage advising that 4075 tons had been forwarded for shipment on the Cacique, that respondent had effected an arrangement with the Union Steamship Company of the transfer of 1500 tons, and that 524 tons (which was actually 572 tons) had been procured elsewhere which made up a total of 6099 tons. In the same letter, respondent advised libelant that it was respondent's understanding that the Steamer Cacique would leave on June 14th, and again that it would sail June 24th, and that its plans had been made accordingly. Attention was also called to the fact that the sailing date, as then

learned, was July 10th upon which ground, respondent disclaimed liability if it should not be able to supply the full 6200 tons (49). The contention was advanced by respondent that the contract "calls for June loading, which in the parlance must necessarily mean June shipping".

In response to this letter, libelant wrote respondent June 6th taking issue with respondent's contention as to June shipment and requiring that respondent's shipments must be "alongside our vessel on June 27th ready for loading as fast as ship can receive" (47-48).

Replying to this letter, on June 14th, respondent confirmed its previous statements as to the tons of cargo forwarded for shipment on the steamer Cacique, but while offering said shipment advised libelant that if the letter attempts to hold the tonnage actually shipped for dead freight, respondent would decline to load any of the cargo. In the same letter, respondent attempts to show, in an argumentative way, that the contract of February 25, 1916, was not binding upon respondent, inasmuch as the "Steamer Cacique had taken out a clearance for July 5th instead of loading and clearing in June". The letter closed with the statement

"Our shipments of the 4075 ton quantity will be ready and alongside your steamer on June 27th as indicated by you". (Exhibit "D", pp. 50-51.)

On June 22, 1916, libelant advised respondent at San Francisco, as follows:

“Supplementary to our letter of June 6th advising that Steamer Cacique would be ready for loading June 27th:

“Please note the delivery of 6200 tons automobiles and parts full quantity your engagement under contract, dated February 25th, must commence on that date, June 27th, and be completed not later than June 29th.”

A letter was written by Mr. Davis of the Ford Motor Motor Company to the railroad company, which letter bore date June 22nd.

“Until you are advised to do so, please do not under any circumstances deliver any of the cargo at present on hand booked Steamer Cacique to W. R. Grace & Co.”(303).

At or about that time, whether before or after, is not clear from the record, but is immaterial in view of the letters which passed between respondent and libelant, there was delivered upon Pier No. 26, at which the Steamer Cacique was to dock, about 1100 packages of respondent's automobiles, a total of about 1500 tons, for shipment by the Cacique, and they were so received by libelant. In its brief, libelant argues that these 1500 tons were delivered by mistake, or partly in contravention of the order, above mentioned, to the Southern Pacific Company. This question is set at rest, however, by the allegations in paragraph V of the libel, that the 1100 packages referred to

“were deposited by respondent, Ford Motor Company of Canada on Pier 26 in the City and County of San Francisco, the wharf of libelant,

alongside of which said Steamer Cacique was to dock", etc. (11.)

Libelant's manager states that these packages were so delivered and received as freight for the Steamer Cacique and appellant actually seized them under the libel in rem in this action on June 27th (228-230).

On June 24th, respondent's San Francisco agent addressed another letter to libelant stating that 4075 tons is the entire cargo for the Steamer Cacique, announcing his purpose to withhold loading of that cargo if libelant intends to hold said 4075 tons for the full freight of 6200 tons (138).

On the night of June 26th, libelant telegraphed respondent at Ford, Ontario, referring to the contract, acknowledging receipt of the above-mentioned letters of June 14th and June 24th, and insisting upon fulfillment of the contract "in every particular". Libelant stands "strictly upon the contract" and declared its readiness to perform the contract and its willingness to accept such quantity "of automobiles as are delivered to us and hold you responsible for all damages, including demurrage which we may ultimately sustain by reason of any breach of said contract". In the same telegram, libelant also stated that it does

"not accept such smaller quantity as full satisfaction of the contract of February 25th, but only as the partial satisfaction which it in fact, is; and by acceptance of any such smaller quantity we do not in any way release or waive any

claim for damages or demurrage due to your breach of your contract”.

This telegram was confirmed by letter to the San Francisco office on the same day (138-139).

At about 7:30 A. M. on June 27, 1916, the Steamer Cacique arrived at San Francisco, and shortly thereafter docked at Pier 26. At that time and throughout the unloading of the inward cargo, there was a general strike of stevedores in effect on the whole of the San Francisco Water Front. S. S. Cacique brought a mixed cargo of 7900 tons from Oriental ports which was a full cargo for the vessel. This cargo was unloaded as rapidly as possible. The unloading was completed on July 8th, at 6:00 P. M. after which the vessel went into dry dock. When the vessel docked at Pier 26 and continuously thereafter while the vessel was unloading and until after July 12th when the vessel returned to Pier 26, the 1100 packages of respondent's automobiles, approximating 1500 cargo tons, remained on said pier where they had been placed on June 23rd and June 24th. No cargo was loaded, nor was attempt made to load any, until July 12th.

On June 27th, the date of the vessel's arrival at the port of San Francisco at 4:00 o'clock in the afternoon, libelant began the present action, and by libel in rem seized the 1100 packages in its possession, and by writ of foreign attachment levied upon about 4000 additional tons of automobiles, the property of respondent, then in the possession of the

Southern Pacific Company at San Francisco. This included all of the shipments made by respondent to San Francisco for ocean carriage. The property so libeled and attached, remained in the custody of the United States marshal under said libel and writ, until July 5, 1916, when it was released on bond furnished by respondent and subsequently was loaded upon the Steamer Cacique and transported to Australia and New Zealand. None of this cargo was loaded, however, until after July 12th and it was not completely loaded until July 26th. The vessel sailed on the morning of July 27th.

In the meantime and as soon as the vessel had completed her unloading on the afternoon of July 8th, she was ordered into drydock by Lloyd's surveyor and underwent repairs while in drydock. Until such repairs had been made, the vessel was unseaworthy and would not have been allowed to clear the port at San Francisco. We particularly stress the date and hour of the arrival of the Steamer Cacique at the port of San Francisco, because appellant in its brief has stated, perhaps unintentionally, that the S. S. Cacique arrived and berthed in the evening of June 27th (27) and that the goods were libeled before the vessel arrived and berthed. Both of these statements in appellant's brief are incorrect. The vessel arrived in the port of San Francisco and commenced the discharge of her cargo at 7:30 o'clock of June 27, 1916 (see Answers to Interrogatories 11 and 12, page 71, Apostles on Appeal). This action was begun and the goods were

libeled later in the day, which fact was admitted by appellant's manager.

One June 28, 1916, which was the day following the arrival and berthing of the Steamer Cacique at San Francisco, libelant telegraphed respondent at Ford, Ontario, and also advised respondent's local agent, as follows:

“Please take notice that, in accordance with our previous advices, the Steamship “Cacique” was ready to load your cargo contracted for on February 25th, 1916, on *June 27th, 1916, at 9 P. M.* As you have failed to deliver the cargo alongside steamer as fast as vessel can load, demurrage at the rate of \$3000.00 per day commences on the day and at the hour last mentioned.

We this morning wired above to your Ford, Ontario, office.” (141.)

The hour named in the telegram, 9:00 P. M. June 27, 1916, as the time at which the vessel “Cacique” was ready to load respondent's cargo, was several hours after the present suit had been filed, and the freight and cargo libeled, and was two days short of the time allowance fixed in the letter of June 22nd, previously noted, as the time during which respondent should deliver its cargo tonnage to libelant (225).

The District Court filed a written opinion holding that the contract required that the cargo should be loaded in the month of June, 1916; that there had been no actual breach of the contract on the part of the respondent at the time the action was commenced; that there had been no breach by respond-

ent of the contract in anticipation of the time of performance, and that libelant could not proceed in rem against the portion of the cargo that had been delivered and received as freight and at the same time prosecute the action on the theory that there had been an entire and complete breach by repudiation. Accordingly, the libel was ordered dismissed and a final decree was so entered.

At pages 26 and following of the Brief for Appellant, proctors for appellant present four main propositions which we shall consider in their order.

I. ANSWER TO THE ARGUMENT THAT THERE WAS AN ACTUAL BREACH OF THE CONTRACT BY RESPONDENT.

We have grave doubt of the propriety of appellant's argument in this behalf, inasmuch as the libel charges only a breach in anticipation of the time when performance was due. We prefer, however, to meet the issue on its merits. Appellant's argument on this breach of the case is founded on certain premises which an examination of the record will be found to be not entirely correct. Passing such as might be considered inferences drawn by counsel, we deem it proper, if not necessary, for a true presentation of the case to note the following:

Respondent had in San Francisco on June 27th for shipment on the vessel Cacique not 4,075 tons but 4,650 odd tons which were subsequently actually conveyed on said steamer (193).

We have already adverted to appellant's error as to the day and hour at which the steamer *Cacique* was expected to and did arrive at her berth. She arrived and berthed on the morning of June 27th at 7:30 A. M. (71).

Appellant's statement that the Southern Pacific, presumably as distinguished from respondent, delivered a portion of the cargo to appellant, cannot be considered in the light of the express allegation in the libel, nor may any inference be rightly drawn by appellant as against the respondent from any act or statement of the Southern Pacific.

Appellant's statement that notice was given to the Southern Pacific not to give any cargo to libelant is subject to the correction that the notice said "Until you are advised to do so", etc., and that letter was given before performance on respondent's part was due (304).

We concede the correctness of appellant's statements, that respondent started to fill the contract on May 1st, and on May 11th found it impossible to ship the full cargo contemplated; actually shipped at that time only 4075 tons; all of which had arrived in San Francisco before the libel was filed, and that 30 cars, or about 1500 tons, had been delivered on libelant's wharf. We will also concede, for the sake of the argument of this proposition, that respondent refused or at least failed to deliver the full 6200 tons contracted for. It is also claimed that respondent's goods were stopped in transit in order to com-

pel the making of a new contract, and that libellant was notified not to touch respondent's cargo or to prepare it for loading on the Cacique. This was either an unintentional misstatement of fact, or an unwarranted inference, drawn by appellant, from something that may have been stated by an employee of the Southern Pacific Company either before or after the suit was filed. There is no evidence that an employee of the Southern Pacific, or any other person, made such a statement or gave such a notice, and, if it had been so given by some employee of the Southern Pacific, it was not binding upon respondent and should be dismissed in the consideration of the case.

With these preliminaries disposed of, we will proceed to a consideration of the arguments advanced in appellant's behalf.

In substance appellant's argument is that although both parties had as early as May 1st begun performance of the contract and respondent had sent forward 4,075 tons, which had reached San Francisco for shipment on the Steamer Cacique before the vessel arrived at the port of San Francisco on June 27th, respondent's failure or refusal to furnish the full 6200 tons of cargo on or before that date constituted an actual breach of contract. To sustain this claim, it was necessary for appellant to show that performance on respondent's part was due on June 27th, and that libellant was ready, able and willing to perform its obligations. The District Court held that there was no actual breach of the

contract, for the reason that performance on respondent's part was not due when the libel was filed, and that on June 27th the steamer "was not ready to take on cargo and could not have been made ready to do so" (450).

Proctor for appellant asserts that the Court was in error. No principle of law is invoked, however, and none could be, as it is fundamental that there could be no actual breach of a contract where performance was not due; nor could there be recovery for breach if the party seeking recovery was not able, ready and willing to perform. Counsel's exception, therefore, must be based on the facts. Respondent's obligation was to deliver alongside the steamer "as fast as vessel can load" 6200 tons of automobiles in packages for "shipment per American S. S. 'Cacique' June loading". The contract also required libelant to advise "definitely exact loading date" (47). Libelant with full knowledge of the steamer's disabled condition, and of respondent's apparent inability to deliver the full tonnage contracted for, under the terms of the contract, notified respondent in writing on June 22nd that the vessel would arrive June 27th, also as follows:

"Please note the delivery 6200 tons automobiles and parts, full quantity your engagement, under contract dated February 25 must commence on that date June 27th, and be completed not later than June 29th". (351.)

Respondent, therefore, was required to perform the contract and deliver its 6200 tons of cargo dur-

ing three full days, the 27th, 28th and 29th of June, and then only “as fast as vessel can load”, because such was the provision of the contract. In no event could respondent be in actual default until the three days had elapsed, and then, only, if the vessel had been ready to load.

The action was begun on the 27th day of June, the day that the vessel arrived. At that time two and one-half of the three days specified by libelant in its notice of June 22nd had not expired. It was clearly shown that at no time during the 27th day of June, or for some time thereafter, could libelant have loaded any of its cargo. The condition of the vessel in respect to her inability to load, is best shown by the following admission on the part of libelant:

The vessel arrived and docked on the morning of June 27th. She had a full cargo of 7900 tons Chinese merchandise. She did not complete unloading her inward cargo until the afternoon of July 8th (71-72). Libelant’s manager did not expect to commence loading before the 30th day of June (210) and became satisfied, subsequently, that the ship could not take on any freight before the last minute of the last day of June (211). There were on the dock, when the vessel arrived, and, thereafter, continuously until subsequent to July 12th when the same were actually loaded, 1100 packages or 1500 tons of respondent’s cargo. This cargo was ready for shipment (226). It was received by libelant as freight and so attached by the libel in rem (230).

Any doubt upon this subject is set at rest by the statement of the same witness that on June 28th, libelant had not been in a condition to load any freight on the Steamer Cacique (223). The steamer had suffered injuries of a serious nature on her inward voyage. Libelant's manager admitted that the vessel would not be permitted to sail, without a seaworthy certificate from Lloyd's (239); and that it would also be necessary to fumigate the vessel (228).

Joseph Blacket, surveyor for "Lloyd's Register" of shipping at San Francisco, ordered the vessel to drydock in view of the report of the surveyor at Hong Kong, and required that certain repairs be made. He testifies that without such repairs the vessel was unseaworthy, and would not have been permitted to go to sea (244). W. E. Heppel, surveyor for Johnson & Higgins, testified to the same effect (342, 343).

No testimony was offered to controvert that. In fact the injuries described by the surveyors were admitted by libelant in its answers to interrogatories attached to respondent's answer. Therefore, the vessel was unseaworthy, and libelant, for that reason, as well as others, was unable to load, and did not load, any cargo during the month of June.

The libel was filed on the 27th of June, which was in advance of the time when performance was due on respondent's part, and, therefore, in advance of an actual breach of contract, and the District Court so decided.

Libelant's argument that the attachment by libel in rem of the 1100 packages was more consistent with an actual breach of the contract, than with a partial performance thereof, is rather more specious than sound. Had there been an actual breach, the packages could have been so attached, but it does not follow that there was an actual breach because the packages were attached. While the argument has more the character of shadow than of substance, the verified libel charges that these packages were delivered in part performance (11).

Finally, proctor for libelant charges that respondent breached the contract by a letter of June 1st, from which a detached sentence is quoted. A breach at that date could, at best, be only anticipatory, and not actual. Furthermore, the quoted passage was qualified by later letters and by its context, and was not the breach alleged in the libel. We shall address ourselves to anticipatory, as distinguished from actual, breaches in later pages devoted to a consideration of appellant's argument on that breach of the case.

On the uncontroverted facts, as shown by the record, the steamer was not ready to load any of respondent's cargo on June 27th, or during any day in June; and the time for performance or delivery on respondent's part had not arrived, when the libel was filed, as was shown by the letter and telegram sent to respondent on June 28th (141). It follows that there was no actual breach on respondent's part, and the District Court correctly so decided.

II. ANSWER TO THE ARGUMENT THAT RESPONDENT COMMITTED AN ANTICIPATORY BREACH.

Appellant's first proposition is that the case was decided on "mere technicalities". Appellant was permitted to introduce all the evidence which it had to offer. It was given access to the files and correspondence of respondent and introduced the same. Proctor for appellant argued the case orally and presented a written memorandum. The District Court rendered its decision on fundamental legal grounds, holding that the contract required June loading; that libelant was, itself, unable to perform the contract or to load any cargo in June; that respondent did not commit an actual breach of contract, nor was there an anticipatory breach thereof. There was nothing technical in this disposition of the case upon its merits.

Passing the reference to counsel for respondent, which, to say the least, is most unusual, we note libelant's contention that on this appeal errors of date, questions of variance, shortcomings of counsel, technical rules and forms will be disregarded. We cannot agree to the broad contentions reserved by libelant nor do such contentions find support in our understanding of the decisions or the rules of this Court. The learned District Court rendered an opinion in writing which is set out at page 450 and following, *Apostles on Appeal*. It was predicated upon fundamental principles of law that cannot be questioned. The evidence cited in the opinion is uncontroverted, and supports the decision in every

particular. The decision, itself, disposes of every argument advanced by the appellant on this appeal. Appellant's case failed, not because of any variance between the pleadings and the proof, or on account of any technical error; but because appellant's evidence failed to make out any case whatever. Appellant had every facility on the trial to sustain its theory of the case and respondent offered no defense not clearly stated in its answer. On such a record it would be manifestly unjust to disregard the verified libel, the answers to the interrogatories, the documentary evidence or the testimony of appellant's manager, and unless all of these elements are disregarded in this Court, the decision of the learned District Court cannot be successfully questioned.

The cases cited by appellant deal merely with the situation that results when the appellate court can see clearly, from the record, that appellant has made out a complete case, but that he has failed to obtain relief because of his failure to properly state his case.

In *Davis v. Adams* the appellant had proceeded below on the theory that he had been enticed aboard the appellee's ship and detained against his will. The case proved, was that he had signed articles but was discharged without cause before the end of the voyage. The appellate Court sent the case back, with instructions to allow appellant to amend his libel to conform to the facts established

by the evidence, and upon such facts to enter judgment.

The libel considered in *The Gazelle and Cargo* claimed only demurrage and expenses to the amount of \$2,470.20, and general relief; judgment was for more than the specific amount claimed. The Court stated that the libel set forth all the material facts ultimately found by the Court. The decree was very properly affirmed on the ground that the Court might award any relief “which the law applicable to the case warrants”.

In *Wiggins Ferry Co. v. Ohio & M. Ry. Co.* the Court was considering its power to remand the case “for an amendment of the pleadings and such further proceedings as may be consonant with justice”. In that case the appellant endeavored to recover rent, on the theory that the relation of landlord and tenant had subsisted. The Court held that no such relation existed, but that appellant was entitled to some compensation for the occupation of its property by the appellee, who was under equitable obligation to perform the covenants forming the consideration of the grant, so long as it held possession. The case was sent back to allow appellant to amend its pleadings. It was merely in view of this situation that the Court made the remark quoted at page 33 of Appellant’s Brief; and that quotation is preceded by the following:

“Rules of pleading are made for the attainment of substantial justice, and are to be construed so as to harmonize with it if possible”.

Respondent would earnestly object to any amendment of the libel at this time, not only because such amendment would not aid substantial justice, but because it would work a distinct and substantial prejudice to respondent. The wheels of time cannot be turned back to June, 1916, at which time appellant with the knowledge of all the facts disclosed upon the trial, elected its remedy. The conduct of respondent at that time, and its course at all times since, and during the trial has been controlled by the case as made by appellant's pleadings and its evidence.

Nor can appellant in this Court claim a benefit from an assumption of mistake on its part in libeling "the 30 carloads of automobiles in its possession by process in rem", or because respondent might have had such attachment set aside on motion. The evil of appellant's position is deep-rooted, and was not the result of hasty action prompted by ignorance of the facts. The filing of the libel and the seizure of the 1100 packages of freight in its possession was the deliberate consummation of a policy declared in its letters and notices to respondent. The libel in this action alleges that respondent breached the contract in anticipation of performance due, by two letters: One dated June 14th and received by appellant on June 23rd; the other, dated June 24th and received before June 26th" (Paragraph VI of the libel, page 11 of the record). We do not concede that those letters, or any acts of respondent, in the light of the facts then known to the parties,

amount to an anticipatory breach of the contract sued upon. They wanted the unqualified, positive refusals to perform the whole contract, which were essential to constitute a breach before performance was due, under the rule of the Supreme Court of the United States as declared in *Dingley v. Oler*, 117 U. S. 490, and *Roehm v. Horst*, 178 id. 1. But, if we grant for the purposes of our discussion of this branch of the case, that such letters amounted to a breach, libelant was required to promptly elect either to consider the contract breached, in which event it could sue for damages without waiting until performance was due; or to ignore the breach and keep the contract alive, in which event it must delay action and give to respondent the chance to perform when performance was due (*Wells v. Hartford Manilla Paper Co.*, 55 Atl. 602).

Appellant pursued the latter course, believing respondent unable to perform its contract, until the vessel had reached the port of San Francisco, and appellant had become satisfied of her unseaworthiness and of appellant's inability to load any cargo in June. Then, and not until then, did appellant treat respondent's letters as constituting an anticipatory breach. Without further demand, or communication with respondent, appellant then began its action and seized by process in rem, the portion of respondent's cargo which it already held as freight.

Appellant's plea for indulgence, on the ground of pretended mistakes and want of information at

the time the suit was filed, comes with bad grace in view of the documentary and oral evidence produced by appellant itself. Appellant knew that the vessel Cacique might require some repairs in San Francisco and, as early as June 6th understood that the vessel would not be able to unload her inward cargo, load her outward cargo and sail until some time in July (221). Appellant also knew, because it was obvious that a late sailing date might enable respondent to secure additional cargo to make up its short tonnage, but knowing these facts, appellant nevertheless demanded on June 22nd delivery of the complete cargo on the 27th, 28th and 29th days of June, notwithstanding the fact that the contract required delivery only "as fast as vessel can load". On June 26th, in responding by telegram and letter to respondent's letters of June 14th and June 24th, wherein respondent admitted its present inability to deliver the whole tonnage, and claimed in an argumentative way that appellant was, itself, unable to perform its contract, or had breached it, by reason of the fact that its vessel would not load or sail until July, and in which letter, also, respondent insisted that the 4000 odd tons, which it was then able to deliver should not be held for dead freight for the whole 6200 tons contracted for, appellant deliberately stated its readiness and ability to perform the contract according to its terms, and demanded that respondent do likewise, and stated that it would accept respondent's cargo as part performance of the contract, but not as

complete performance. Appellant did not, however, reply to respondent's claim that the 4000 odd tons should not be held for dead freight. The letter and telegram definitely announced that no anticipatory breach would be accepted, and that the contract was still in force and would be performed by appellant:

“We now have to advise you that we stand strictly upon the contract made with you, and insist upon your fulfillment of the same in every particular. We are, and have always been, ready to perform all of our obligations under said contract. We further advise you that we will take such quantity of automobiles as are delivered to us and hold you responsible for all damages, including demurrage which we may ultimately sustain by reason of any breach of said contract. * * * We do not accept such smaller quantity as a full satisfaction of the contract of February 25th, but only as the partial satisfaction which it, in fact, is”.

We come now to the morning of June 27th. The vessel arrived at about 7:30 in the morning and berthed shortly after. She was then unseaworthy. The nature and extent of her injuries are set out in the answers to the interrogatories, and in the ship's logs and surveyor's reports, attached as Exhibits “A” to “G” inclusive, to be found at pages 76-92 inclusive of Apostles on Appeal. It is unnecessary here to detail the nature of the injuries. They are uncontroverted and the surveyors called for respondent, unhesitatingly testified, without contradiction, that in the light of those injuries the vessel was unseaworthy when she reached this port,

and at all times until July 12th (pp. 244, 342, 348, 349). Lloyds' surveyor, Mr. Blacket, testified also that the vessel had gone on drydock and made the repairs (page 244). Mr. Carter, manager for appellant, testified that without such seaworthy certificate from Lloyds', the vessel could not have cleared at the port of San Francisco (p. 209). Knowledge of the unseaworthiness of this vessel was brought home to appellant. Though appellant's manager, at several points in his examination, expressed himself as unable to state that the nature and extent of the injuries which rendered the vessel unseaworthy, were brought home to him on the morning of June 27th, he does admit that the limited survey issued by Lloyds' surveyor in Hong-kong and the log of the vessel, were "ship's papers" which would be turned into the office of appellant by the Captain immediately on the arrival of the vessel (pp. 208, 240). A fair conclusion from Mr. Carter's testimony is that he knew the unseaworthiness of his vessel in the forenoon of June 27th, and that was the second circumstance which moved appellant to recur to earlier letters from respondent and seek to base a charge of anticipatory breach thereon. Appellant's course was dictated by the knowledge that, after all its threats and assertions, it was unable to perform the contract, whether complete loading was required in June or the time specified in appellant's notice of June 22nd.

The third explanation of appellant's change of front, if we may be permitted to use the expression, is found in a review of the evidence on the subject of loading. Appellant had been advised of respondent's claim that the words "June loading" required complete loading in June. Assuming that conditions were normal at the port of San Francisco, and that unloading of the inward cargo proceeded during the full twenty-four hours of each day, the shortest period of time fixed by any witness as necessary to unload the inward cargo was seventy-two hours or three days. The morning of June 30th was thus fixed as the earliest time when loading of the outward cargo could have been begun. It was probably this knowledge which prompted appellant to specify in its previous notice that respondent's cargo should be delivered alongside the vessel on the 27th, 28th and 29th days of June. Appellant's manager, Mr. Carter, testified that it was appellant's purpose to commence loading on the 30th (p. 210) on the theory that by loading some, though only a few packages, of the freight upon the vessel, appellant would have made a "June loading" within the terms of this contract. Later the witness admitted that this would have been only a pretense or an impractical thing not usually done, in order to establish a technical "June loading" (219). There were, however, on the dock at that time 1100 packages or about 1500 tons of respondent's cargo for shipment on this vessel. It was there as freight according to the witness and also

according to the allegations of the libel. Whatever may be the claim of appellant as to a mistake on the part of the Southern Pacific, there was nothing to restrain the loading of that portion of the cargo which was on the dock. It was there as freight. It was consigned to the vessel, and no communication from the respondent or the railroad company interfering with its loading, was introduced in evidence. No effort was made to load it, however. The witness testified that developments subsequent to the arrival of the vessel satisfied him that the ship could not take on any freight before the last minute of the last day of June (pp. 210, 211), and on account of the strike it was impossible to secure enough men to complete the discharge of the inward cargo in June. Appellant had even considered loading a portion of respondent's cargo between decks and before the holds were cleaned or the vessel fumigated (pp. 215, 216). This would have subjected respondent's cargo to fumigation overnight with cyanide of potassium (216, 228). The witness stated, however, that it was impossible to load any of the cargo during June (215).

The knowledge of these conditions and of the further fact, admitted by appellant, as to the leaks in the deep bottom fuel oil tanks, served to convince appellant of its inability to load any portion of respondent's cargo in June, whether June loading was requisite under the terms of the contract, or by virtue of the notice given to respondent by appellant to deliver its cargo on June 27th, June 28th

and June 29th. It was then that appellant deliberately concluded to begin its action as for an anticipatory breach on the part of respondent. This course was taken, in the hope that by so doing, appellant would escape the effect of its own inability to load respondent's cargo, or any part of it, in the month of June. This is significant not only as reflecting the true understanding of the contract, but as showing the motives of appellant. Appellant did not ask if there was any reason why the portion of the cargo on the dock should not be loaded. It did not want any more cargo delivered, because it was unable to load that which was already in hand, and, without waiting until the night of the 29th during which time, by virtue of its previous notice, respondent was permitted to deliver its cargo, it filed suit and libeled the cargo on the 27th day of June. The cargo libeled was in part in appellant's possession and in part in the yards of the Southern Pacific Company. In all there were 150 freight cars, exclusive of the 500 odd tons of Peabody cargo, and the 30 carloads which had been unloaded on appellant's dock and which could not be moved without appellant's consent. Appellant had some purpose in filing its libel with such haste, and the explanation is that it wanted to begin action before performance could be made by respondent.

Mr. Carter, manager for appellant, admits that when the libel was filed, the Ford Motor Company of Canada had still forty-eight hours within which to comply with appellant's request to deliver the

cargo (225). Another significant circumstance is that on the morning of June 28th, appellant telegraphed and wrote respondent as follows:

“Please take notice that, in accordance with our previous advices, the Steamship “Cacique” was ready to load your cargo contracted for on February 25th, 1916, on *June 27th, 1916, at 9 P. M.* As you have failed to deliver the cargo alongside steamer as fast as vessel can load, demurrage at the rate of \$3000.00 per day commences on the day and at the hour last mentioned.” (141.)

“*June 27th, 1916 at 9 P. M.*” was specified as the hour at which the vessel was ready to load. That hour was several hours after this action had been begun, and respondent’s cargo had been libeled, which fact appellant well knew. If the vessel was not ready to load until 9 P. M. on June 27th, appellant’s libel, filed some hours earlier, was false in stating that libelant was then ready to perform its contract. But the most damning circumstance, and the one that carries conviction of appellant’s bad faith, is the admission of appellant’s manager, previously noted, that up to the end of the 28th day of June, appellant had not been in a condition to load any freight on the Cacique (223). These facts and others in the record, which it is unnecessary to note, show conclusively that appellant was attempting to play fast and loose in this transaction. If the letters, counted upon in the libel, were in fact breaches of the contract, the duty devolved upon appellant to accept them as such promptly, if it

intended to, or to continue the contract in force. It elected, by its letter and telegram of June 26th, which were prepared not by a clerk but by appellant's manager, to accept the part performance offered by respondent and to stand strictly upon the contract (138). The contract was thus kept alive for all purposes and as binding both parties. When, however, appellant became aware of the unseaworthiness of its vessel, and of its inability to unload the inward cargo, as rapidly as was expected, and to load any of the outward cargo during the month of June, appellant filed its action. The law does not permit of this:

Dingley v. Oler, 117 U. S. 490;

Wells v. Hartford Manilla Paper Co., 55 Atl. 602.

In concluding this branch of the argument, we submit, without disrespect, that an appellant, who had attempted to draw the lines as finely as was done in this action, is not entitled to any sympathy or indulgence at the hands of a Court of Admiralty, or of any other Court.

The evidence above cited is more than sufficient of itself to sustain the decision of the District Court that there was no anticipatory breach of the contract sued upon. If the letters tendered a breach by anticipation, that breach had not been accepted on the part of appellant, but, on the other hand, appellant in unequivocal and positive terms, had continued the contract in force by its letter and

telegram of June 26th, previously noted. The letter and telegram of June 28th (51-52) contained unmistakable proof that the contract had been kept alive by appellant until at least 9 P. M. on June 27th, which was 24 hours after the libel had been filed. Appellant there refers to the contract, notes the fact, although untrue, that the cargo was not delivered as fast as the vessel could load, and closes with notice of a demurrage claim at the rate of \$3000.00 per day. There was no provision for delivery of the cargo as fast as the vessel could load, except in the contract; and there was no provision for the collection of demurrage at the rate of \$3,000.00 per day, but in the contract. There was no necessity of any notice whatever on the part of appellant if, as claimed, the contract had been already breached in anticipation. As to this letter and telegram, the intention and the understanding of the appellant to stand upon the contracts, as still in force, is conclusively shown by the following question and answer of appellant's traffic manager.

“Q. And you intended to tell the Ford Motor Company in that letter that that contract was still in force as to the demurrage for \$3,000.00 a day, did you? A. Yes.” (162.)

Ignoring these facts, however, appellant attacks that portion of the opinion wherein the District Court holds that libelant elected to accept the 1100 pieces as part performance of the original contract, and that there was no anticipatory breach, because at the time the libel was filed, libelant had accepted

the 1100 packages in its possession as freight. Counsel charges that the court was in some manner confused as to the rights and liabilities of the parties. The opinion of the learned District Court is, however, sound in law, and supported by the facts in this case. The 1100 packages were sent to San Francisco as cargo for the Cacique. There was no other freighting contract between the parties except the one with which this action is concerned. As alleged in the libel the packages, aggregating 1500 tons, were delivered at libelant's pier at which the Cacique was to dock and did dock. Appellant's manager testified that these packages were in libelant's possession "as freight" at the time the Libel was filed (451). This was necessary to support the action in rem, and the existence of such condition destroyed any possibility of there being an acceptance of any prior alleged repudiation, which was essential to a breach by anticipation.

Whatever may be its present intention, appellant, having possession of these packages on its dock for loading on the steamer Cacique, and as freight, and without restraint upon its right to load the same, considered them and treated them as freight when it filed its libel and seized them under the process in rem. Much has been said by proctor for appellant as to a telephone message from an employee of the Southern Pacific Company, and as to a letter from that company dated the 27th of June, the day the action was filed, and sent through the mail to libelant on that day, the day of its receipt being

uncertain though probably it was not received until the 28th, to the effect that these packages were delivered by mistake on the part of the railroad company. Any statement made by the railroad company as to its mistake, if any, is not binding upon respondent. However, the letters do not repudiate the contract or refuse to perform the same. Without referring to the contract at all, they merely request that deliveries be delayed until respondent directs them to be made. These letters were written at a time before delivery of respondent's cargo was required under the terms of appellant's notice. Though the local agent for respondent had directed the railroad company not to deliver any of the cargo to Grace & Company until further advised, and had even directed it to take back into its possession any cargo delivered prior to the notice, that can add nothing to the letters which passed from respondent to libelant and particularly the two letters upon which appellant relies in its allegations as to anticipatory breach. If the letters upon which the libel was charged amounted to an anticipatory breach, the letters to the Southern Pacific or any opinion or statement by the Southern Pacific Company, did not add to that breach. If, as appellant now argues, there was an actual breach by the failure to deliver the whole 6200 tons cargo, the letters to the Southern Pacific Company cannot affect that breach. It was not claimed on the trial that respondent had in any way prohibited or interfered with the loading of the said 1100 packages up to the time the libel

was filed or thereafter while the same were held by the marshal, under appellant's process. In any event, the Southern Pacific is not shown to have attempted to retake possession of any of said packages or to interfere with the loading thereof. Appellant admitted, on the other hand, that it had not been prevented from loading the said cargo (229).

Throughout its argument, libelant suffers from a confusion of the law applicable to breach by anticipation and actual breaches. There can be no question that if a contract is breached by anticipation and such breach is promptly accepted by the other party, the latter has an immediate claim for damages. This rule has no application, however, to the instant case, for, as shown by the facts above mentioned, if respondent had tendered an anticipatory breach, no acceptance thereof was made by libelant. Under the decisions, the contract was kept alive for the benefit of both parties until the time of performance fixed by the contract, and by the notice from libelant to respondent to deliver its cargo up to the night of the 29th of June.

Libelant could not play fast and loose, it could not, after receipt of the letters which it claims constituted anticipatory breach, agree to accept such goods as respondent should furnish "as the partial satisfaction which it in fact is," and declare its readiness to proceed with the contract, until the vessel arrived and was found to be unseaworthy and unable to load, and then reverse its policy and claim the benefit of an earlier repudiation of the contract.

Such course was morally wrong and is prohibited by the decisions already cited.

Appellant seeks to escape the District Court's conclusion by the argument that the libeling of those packages in rem, was merely the enforcement of a remedy following a breach of the contract. The fallacy of this argument lies in the fact that appellant presumes that there was a breach of contract. We have already shown, and the District Court so decided, that there could have been no actual breach of contract at the time the libel was filed because performance was not due, and the ship was not ready to load. It is equally clear that there was no anticipatory breach at that time because the libel alleged partial delivery, appellant's argument in this behalf is predicated upon the claim, for the first time now made, that respondent had delivered 1100 packages as part performance of a new contract. That no anticipatory breach existed on the night of the 26th of June, the day before the libel was filed, is shown by appellant's telegram and letter addressed to respondent in which appellant declares the contract still in force, and announces its readiness and ability to perform it, and insists that respondent fulfill the same "in every particular". Appellant in the same telegram and letter also agrees to take "such quantity of automobiles as are delivered to us * * * only as the partial satisfaction which it in fact is" (138 and 139). This acceptance of partial delivery is certainly broad enough to cover the goods already delivered to ap-

pellant, and, in the language of appellant's manager "held as freight". Furthermore, that the contract was still alive at 9:00 A.M. of June 27th, which was some hours after the libel was filed, and was therefore in effect at the time the libel was filed, is evidenced by appellant's telegram and letter of June 28th, previously noted.

We are not concerned with a question as to the legality of the libel in rem, or as to whether the process in rem was extra legal. Whatever the learned proctor for appellant may claim as to his inability in matters of common law, his experience in the admiralty practice certainly disentitles him to claim ignorance of the practice and the law applicable in cases of this impression. However attempted to be disguised appellant's real effort is directed not to an amendment in pleadings or in the form of the process, but to a change of basic facts. The process of the United States Court is not a falcon to be turned loose or whistled back at the whim of any litigant. If the allegation of the libel as to the delivery and acceptance of 1100 packages were expunged, the fact that the 1100 packages were delivered and accepted as freight would still remain, and that fact is the vital thing that is fatal to appellant's case on anticipatory breach. We are not attacking the validity of the libel in rem, though counsel says it was extra legal. The outstanding force of that proceeding on the part of appellant, is that it shows the understanding and intent of the libelant at the time it filed its suit. That under-

standing was best stated by its manager, when he said that the packages were on the dock in appellant's possession as freight. Such is the statement in the libel, and that understanding is the only one consistent with appellant's letter and telegram of June 26th. The seizure by process in rem of these packages in appellant's possession indicate the understanding and the intention of appellant that it had accepted such packages as freight for the Steamer Cacique and as part performance of the contract. Such act constituted an election on appellant's part not to accept an anticipatory breach, if one had been tendered.

Appellant's next position is that the 1100 packages were offered by respondent as a cargo under a new proposed contract, but in this connection appellant also says that the proposed contract was rejected. Consequently the negotiations for a modification of the original contract failed; there was no new contract and the partial performance counted upon in the libel and found by the Court, was of necessity a partial performance of the only then existing contract which is that sued upon in this case. In view of the evidence already reviewed, it is probably unnecessary for us to say that appellant's statement that when respondent left the 30 cars on libelant's wharf, it gave notice to libelant, and to the Southern Pacific that such cargo was not to be used under the original contract, is absolutely without a supporting fact in the record.

The law of anticipatory breach has been clearly settled by the Supreme Court of the United States and the appellate Courts in many of the States. We quote the following concise statement of the Rule from *6 Ruling Case Law*, at page 1025.

“In order to justify the adverse party in treating the renunciation as a breach, the refusal to perform must be of the whole contract or of a covenant going to the whole consideration, and must be distinct, unequivocal, and absolute. * * * It may be observed, however, that the renunciation itself does not *ipso facto* constitute a breach. It is not a breach of the contract unless it is treated as such by the adverse party”. (Hanson v. Slaven, 98 Cal. 377, 382 (33 Pac. 266); Bell v. Bank of California, 153, Cal. 234, 242 (94 Pac. 889).

“In Smoot’s Case, 15 Wall, 36 (21 L. Ed. 107), it was held that mere assertion that the party will be unable, or will refuse to perform his contract, is not sufficient to terminate it; it must be distinct and unequivocal absolute refusal to perform, treated and acted on as such by the promisee. Approved in Dingley v. Oler, 117 U. S. 503. (29 L. Ed. 984, 6 Sup. Ct. Rep. 850.)”

This statement of the law was announced by the decisions of the United States Supreme Court and in the following authorities:

Roehm v. Horst, 178 U. S. 1; 44 L. Ed. 953;
Dingley v. Oler, 117 U. S. 490; 29 L. Ed. 984;
Smoot’s Case, 15 Wall. 36; 21 L. Ed. 107;
Wells v. Hartford Manilla Co., 55 Atl. 599;
Williston on Sales, Sec. 586;
Benjamin on Sales, Sec. 568;

Hanson v. Slaven, 98 Cal. 382;

Bell v. Bank of California, 153 Cal. 241;

Herzog v. Purdy, 119 Cal. 99;

Kilgore v. Northwest, etc., 37 S. W. 473.

As declared by the Supreme Court of Connecticut in *Wells v. Hartford Manilla Co.* if one party unequivocally refuses to perform or repudiates his contract, the other party may adopt such repudiation

“by so acting upon it as in effect to declare that he, too, treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation. He cannot, however, himself proceed with the contract on the footing that it still exists for other purposes, and also treat such renunciation as an immediate breach. If he adopts the renunciation, the contract is at an end, except for the purposes of the action for such wrongful renunciation. If he does not wish to do so, he must wait for the arrival of the time when in the ordinary course a cause of action on the contract would arise. He must elect which course he will pursue”.

In this case appellant did not acquiesce in what it now contends was a repudiation on respondent's part, nor did appellant remain inactive, nor did it take immediate action to recover damages resulting from the anticipatory breach. It elected to stand strictly upon the contract, announced its willingness to accept the cargo offered as partial performance, and insisted upon its claim for damages for any short delivery. After the arrival of the vessel

on June 27th, and before the time of performance on respondent's part was due, appellant changed its policy and then, for the first time, attempted to treat respondent's letters as an anticipatory breach. This it cannot do, for the law does not permit it to so play fast and loose.

Appellant's citation of *Tri-Bullion Smelting Company v. Jacobsen*, indicates a confusion in the mind of counsel of cases of actual breach and anticipatory breach. The Circuit Court of Appeals did not depart from the rule announced by the Supreme Court in *Roehm v. Horst*, *supra*. The case did not involve an anticipatory breach. The contract had been partially performed, and the question discussed and determined was, that a party who had breached the contract was not excused from liability in damages for his breach, though the other party had accepted or acquiesced in the breach. The theory of the *Tri-Bullion Company* was that Jacobsen's letter, urging performance and notifying the *Tri-Bullion Company* of his purpose to go into the market and purchase his requirements, was an acquiescence in the breach, and that such acquiescence excused the *Tri-Bullion Company* from liability for any damages. That was the only question decided by the court and that question is not here involved.

Appellant cites *Frankfurt-Barnett Co. v. William Prym Co.* to the point that a distinction exists between a waiver of the right to treat a breach of a

contract as a discharge of the contract, and the waiver of a right to recover damages occasioned by the breach. Respondent does not question the soundness of this distinction. The cited case, however, is without application. There was partial performance of the contract. The defendant failed to continue its deliveries as required by the contract notwithstanding repeated promises so to do. It was determined in the passage quoted by appellant that the injured party had not waived his right to damages.

Marks v. Van Eighen, 85 Fed. 853, is referred to as a case cited by respondent in the District Court. We accept it as a correct statement of the law. Under the rules there declared, appellant was required, if the letters relied upon actually constituted a repudiation of the contract, to elect whether to treat the contract as terminated or as still existing. If appellant did not do so, its right of action for a breach could only rest upon the refusal of the other party to perform the existing contract according to its terms.

With the legal principles thus established, their application to the facts of the case should not be difficult. Appellant has attempted to so apply them, but, in almost every particular, his statement of the facts does not conform to the evidence as shown by the record. In an abstract way, it is said that the contract was renounced by frequent acts and notices on the part of respondent and that libelant had elected to treat the contract as termi-

nated. We must assume that the acts and notices were those assigned in the libel, and we have already shown, we believe, that those notices were not accepted by appellant as anticipatory breaches.

Counsel's statements are merely the inference which he has drawn in the interests of his clients' cause.

Under the rule as declared by the Supreme Court of the United States, and in the case of *Marks v. Van Eighen*, two things are essential to constitute anticipatory breach: (1st) The unqualified and absolute refusal to perform the entire contract; and (2nd) The acceptance of such repudiation by acting thereon as a termination of the contract, except for the purpose of recovering damages from the guilty party. As was held in *Turner-Cummings Co. v. Ryan Lumber Co.*, 201 S. W., page 431,

“the mere notice of an intention to breach a contract in the future, at a time when the contract is in the course of performance and is virtually being performed, is not sufficient to justify the other party to the contract to declare the contract breached”.

The correspondence set out in the record clearly shows that respondent was endeavoring to secure sufficient cargo to meet the contract obligations while some 4000 tons were already en route on ocean ladings for movement on appellant's vessel at the time the letters referred to were written. In one of the letters relied upon, viz., that of June 1st, respondent advised appellant in detail of the ship-

ment of 4075 tons and announced that it had effected, as was thought to be the fact at that time, an arrangement to borrow the short tonnage from its shipments then in San Francisco for movement on the Union Steamship Company's steamers. For the purpose of the argument, however, we do not consider it necessary to discuss in detail the first of the two essentials above mentioned.

Appellant under the cited cases, must show not only the unequivocal repudiation of the entire contract, but also an acceptance thereof to sustain an action. If, therefore, the claimed repudiation was not accepted, the anticipatory breach did not exist at the time the action was commenced. The alleged breach was not accepted or acquiesced in. Three circumstances, which have been already noted and to which we shall briefly again refer, show conclusively that appellant did not accept the tendered renunciation, if any, but stood upon the contract and kept it alive for all purposes. The libel alleges that the anticipatory breach consisted of two letters written by respondent to appellant on June 14th and June 24th, respectively. On June 26th appellant's manager prepared and dispatched a telegram to respondent's Canadian office and a letter to its San Francisco agent in which, after referring to the specific contract here involved and acknowledging the receipt of the two letters so relied upon, he says

“We stand strictly upon the contract made with you and insist upon your fulfillment of the same in every particular. We are and have

always been ready to perform all of our obligations under said contract”.

After declaring its willingness to accept the smaller quantity of automobiles offered by respondent in the letters referred to, appellant continued

“We do not accept such smaller quantity as a full satisfaction of the contract of February 25th, but only as a partial satisfaction which it, in fact, is”.

The second circumstance evidencing appellant's election to continue the contract in force, was the attachment of the 1100 packages of respondent's cargo by process in rem. As previously shown, this was delivered, and it is so admitted in the pleadings, as a part of the cargo for movement on the Steamer Cacique under the terms of the contract sued upon. It was in appellant's possession as freight, and it is so admitted by appellant's manager. It could not be reached by process in rem, except as freight, and the seizure of it by libel in rem evidences the understanding and intent of appellant that such packages were in its possession as part performance, which condition was fatal to a claim of anticipatory breach.

The third circumstance is a telegram dispatched to respondent's Ontario office on June 28th, and the letter sent to respondent's agent in San Francisco on the same date (141). These have been previously quoted. If the contract had not been existent and in force on June 27th, 1916, at 9 p. m., appellant

was not called upon to advise the date and hour when performance on respondent's part was due; and if such contract were not so existent, there was no basis for the claim there advanced by appellant for demurrage at the rate of \$3,000 per day. According to its own testimony (162), appellant intended to tell the Ford Motor Company by that letter that the contract was still in force. By no form of sophistry can appellant argue away the effect of these indisputable facts, appellant by such deliberate acts elected to continue the contract in effect, believing that its interests would be served thereby. There was accordingly no anticipatory breach.

Appellant's claim that respondent breached the contract by not delivering the full 6200 tons of cargo on June 27th is more properly applicable to a theory of actual breach. That matter has been fully discussed in the earlier pages of this brief.

The cases cited at pages 45 and 46 of appellant's brief announces no principle of law at variance with the decisions above noted. Indeed we can not conceive that the State Courts or the Circuit Court of Appeals would set at naught the decisions of the United States Supreme Court as declared in *Roehm v. Horst* and *Dingley v. Oler*. We respectfully urge consideration of the latter case because of the close similarity of facts. The rule announced by the Supreme Court of Connecticut in *Wells v. Hartford Manilla Co.*, *supra*, is peculiarly applicable to

the instant case. On the subject of acceptance of renunciation, the Court there says:

“A renunciation does not create a breach. There must be an adoption of the renunciation. The renunciation must be so distinct that its purpose is manifest and so absolute that the intention to no longer abide by the terms of the contract is beyond question. The acquiescence therein must be as patent. There must be no opportunity left to the promisee to thereafter insist upon performance if that shall prove more advantageous, or sue for damages for a breach if events shall render that course the more promising”.

Viewed in the light of that rule, which so far as our research has discovered is universally accepted, it is patent that there was no anticipatory breach on the facts of this case.

III.

CONSTRUCTION OF THE CONTRACT.

Appellant's argument is directed to a discussion of the meaning of the contract words “June loading”. Proctor for appellant advances the theory that “June loading”, as used in this contract means loading at sometime other than June. Respondent claimed in the District Court, and now insists, that the term “June loading” as employed in the contract meant that W. R. Grace & Company undertook to move respondent's cargo in June.

Appellant's argument on final analysis is really this: The term "June loading" does not mean loading in June, but does mean loading sometime when the Cacique should return from her expected trip to Oriental ports. That is not the meaning of the words "June loading" given by appellant's manager at the trial. He had two explanations of the term. One was that the requirement for "June loading" would be met by putting a few packages, or a few tons, aboard the steamer on the last day of June, even though afterwards it was necessary to fumigate the vessel with this much of the cargo on it. His next explanation was that "June loading" could be made at any reasonable time after June. In claiming this, as was readily seen, however, he claimed too much, for if the term "June loading" did not require appellant to load and move respondent's cargo in June, it did not require respondent to have that cargo ready for loading in June. The term could not be read as furnishing a fixed date for performance on the part of one party to the contract, and as providing for no date of performance, on the part of the other party.

We shall not attempt an elaborate discussion of this question: We believe that the words "June loading", singly and collectively, are perfectly clear if we shall take the contract by the four corners, put ourselves in the position of the parties who signed it and read it.

The Ford Motor Company of Canada was seeking space to move its automobiles to Australian ports.

It went to Grace & Company for space because there was not sufficient space otherwise available for its wants. The first step in the negotiations was Mr. Davis' visit to Grace & Company upon receipt of the telegram from respondent bearing date February 23rd, 1916. That telegram required Davis to secure for respondent space for "May and June sailing" (361). Davis wired in reply February 24th, "If you can take 6200 tons for early June can close with Grace Company". Respondent answered February 25th, "Accept Grace offer 6200 tons. Confirm advising names and dates of sailing". On the strength of these wires, Davis signed the contract, and on February 27th confirmed the same by wiring respondent, "Have signed with Grace American Steamer Cacique about June 24th".

Davis had only the limited authority evidenced by the telegrams, that is to say, he was authorized only to secure space for not later than June sailing. Libelant knew this limitation for it was shown the telegram upon which Davis acted. Libelant alone drew the contract for "June loading". Davis obviously accepted it, believing that he was getting what he was authorized to get, namely, "June sailing", for all his later correspondence with respondent treats the term "June loading" as "June sailing". The term must, therefore, be so accepted in considering the rights and obligations of the parties under the contract (California Civil Code, 1649, 1654 and 1636).

If Mr. Davis had signed a contract containing the clause "Shipment: per 'Cacique' June, July or August loading", it would not have been within the scope of the authorization to him and the respondent could have ignored his act had it so elected. "Shipment: per S. S. 'Cacique' *June* loading," does not mean: "Shipment: per S. S. 'Cacique' June or July or August loading". Nor does it mean: "Shipment: per S. S. 'Cacique' loading to begin when she returns from the Orient". The language employed in this agreement is altogether inappropriate to express the meaning that libelant now attempts to attach to it. It would have been very simple to use language that would have meant what libelant says it was intended to express, but that language would have been very different from the words actually employed.

The language of the contract must govern, and the intention of the parties is to be ascertained from the language alone, if such language is clear and explicit. The words "June loading" are in themselves, clear and explicit. There is no showing that they were used in a technical sense or that they have a different meaning by usage. They are, therefore, to be understood in their ordinary and popular sense (Civil Code, 1644, 1638 and 1639).

If there were any ambiguity or uncertainty in the term "*June loading*," it was because libelant, who drew the contract and chose its terms, made it so. It must, therefore, be construed in the sense accepted

by respondent. The telegrams already quoted, and the subsequent correspondence show this was “June sailing” (267, 268, 270, 272).

The argument of appellant, both as to the construction of the contract and as to the absence of the cancellation clause, is completely answered by the decision of the Circuit Court in *Gray v. Moore et al.*, 37 Fed. 266. The action was in admiralty on libels for breach of contracts to furnish freight. The agreements were to furnish cotton “per S. S. City of Manchester, here about 20th of November * * * for Havre, at three-quarters cents per pound”. The vessel did not reach her loading port until December 6th. The freight owners claimed release from the contract because the vessel did not arrive in time to carry out the contracts. The ship’s agents asserted that at the making of the contract they had exhibited their information as to the position of the ship, upon which they estimated the date of her arrival, and that proceeding on such facts they did not contract for November shipments or with the cancellation clause.

The Court says:

“On this showing it seems clear that the contention of the defendants that they entered into the contracts on the faith of the representations of the agents of the ship that she would arrive about November 20th is well founded.”

After commenting upon the fact that the agents for the ship advised the owners of the information given to the shippers that the vessel would arrive

soon after November 20th, which is the equivalent of the information obtained by libelant from the telegrams exhibited in the present case.

The Court proceeds:

“When time, therefore, is specified, and both parties contract with regard to it, whether it be the time at which the vessel is to be ready to receive cargo, or the day of sailing, or of arrival outwards, or the day of any other event in the voyage, the courts hold that it is in the nature of a condition precedent to the rights of the owner under the rest of the charter-party.” *Macl. Shipp.* 372. Time and situation of a vessel are materially essential parts of the contract of charter-party or affreightment. See *Lowber v. Bangs*, 2 Wall. 732; *Davison v. Von Lingen*, 113 U. S. 50, 5 Sup. Ct. Rep. 346; *Norrington v. Wright*, 115 U. S. 188, 6 Sup. Ct. Rep. 12; *Filley v. Pope*, 115 U. S. 213, 6 Sup. Ct. Rep. 19; *Rolling-Mill Co. v. Rhodes*, 121 U. S. 260, 7 Sup. Ct. Rep. 882. The proctors for libelant contend that, as there was no canceling clause in said contracts, (and on this point there is some evidence to show that the ship’s agents refused to put in a canceling clause), the contract was enforceable against the defendants at whatever date the ship might arrive. On this point it is only necessary to say that the presence or absence of a canceling clause in the contracts sued on can cut no figure; because the contracts were based upon untrue representations as to the sailing and arrival of the ship, which representations amounted to warranties on the part of the ship and her agents. It seems clear that libelant cannot recover, and judgment to that effect will be entered; costs of this and the district court to be paid by libelant.”

The Supreme Court in *Davison v. Von Lingen*, 113 U. S. 40, construed a stipulation that the vessel is “now sailed or about to sail from Benizaf with a cargo for Philadelphia”. At the time the charter was signed the charterers wanted a guaranty that the vessel would arrive in time to load in August. This was refused and the clause permitting cancellation for late arrival was stricken from the charter before signing. The steamer sailed from Benizaf eight or nine days later than the date of the charter and did not make her loading port until September 7th.

We quote the following from the Court’s decision:

“That the stipulation in the charter-party, that the vessel is ‘now sailed or about to sail from Benizaf, with cargo, for Philadelphia’, is a warranty or a condition precedent, is, we think, quite clear. It is a substantive part of the contract and not a mere representation and is not an independent agreement, serving only as a foundation for an action for compensation in damages. A breach of it by one party justifies a repudiation of the contract by the other party, if it has not been partially executed in his favor.”

It is universally recognized that promptness is essential in fulfillment of commercial contracts.

In *Lowber v. Bangs*, 2 Wall 728; 17 L. Ed. 768, the court said:

“Promptitude in the fulfillment of engagements is the life of commercial success. The state of the market at home and abroad, the solvency of houses, the rates of exchange and of freight, and various other circumstances

which go to control the issues of profit or loss, render it more important in the enterprises of the trader than in any other business.”

In *Norrington v. Wright*, 115 U. S. 188; 29 L. Ed. 366, it was said:

“In the contracts of merchants, time is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons. A statement descriptive of the subject matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, in the sense in which that term is used in insurance and maritime law, that is to say, a condition precedent, upon the failure or non-performance of which the party aggrieved may repudiate the whole contract. *Behn v. Burness*, 3 B. & S. 751; *Bowes v. Shand*, 2 App. Cas. 455; *Lowber v. Bangs*, 2 Wall. 728 (69 U. S. bk. 17 L. Ed. 768); *Davis v. Von Lingen*, 113 U. S. 40 (Bk. 28, L. Ed. 885).

Referring to the prima facie meaning of the language as written libellant argues, that the clause “will advise more definitely as to exact loading date” referred to the month of loading, as well as to the day, and that the contract therefore, provided no month and no day for loading. This construction, however, does violence to the contract as written, by practically expunging the two words “June loading” which were put into the contract for some purpose. We construe the clause “will advise more definitely as to exact loading date” in conjunction with “June loading”, and as indi-

cating that, while the loading was to be made in June, the exact date in June was to be fixed by appellant when, on the approach of the vessel, that date could be more definitely determined. Such a construction preserves all provisions of the contract and allows them to function as written, and accords with the plain, everyday meaning of the words.

For the ostensible purpose of showing the intention of the parties in making the contract, libellant has quoted the testimony of its manager, Mr. Carter, and its traffic clerk, Mr. Moore. While it is conceded, as a rule of law, that parol evidence of the surrounding circumstances is admissible in the interpretation of a contract, that rule is also subject to exceptions which are universally recognized. This was the rule of the Common Law and it has been crystallized into Section 1647 of the *Civil Code*, and Section 1860 of the *Code of Civil Procedure* of California. Speaking on that question, the Supreme Court of California say in *United Iron Works v. Outer Harbor Co.*, 168 Cal. 84.

“This rule of evidence is invoked and employed only in cases where upon the face of the contract itself there is doubt and the evidence is used to dispel that doubt, not by showing that the parties meant something other *than* what they said but by showing what they meant *by* what they said.” (Quoting numerous authorities.)

There is nothing doubtful about the term “June loading”. It is as clear as “June wedding” or

“June delivery” are in ordinary parlance. Moreover, it is settled by the decisions and, in many states, by statute, that all previous negotiations or representations are merged into the contract as written, unless reformation of the contract is sought, which is not the case here. Giving to the testimony quoted the broadest significance, it means that libelant told Davis, while the contract was under negotiation, that no definite date for loading could be determined. The same witness testified that respondent’s agent Davis was seeking cargo space for May and June sailing. This was known to libelant’s officers, and they admit, though with some reluctance, that Mr. Davis was assured that the cargo would be loaded some time in June (122, 123). Assuming, however, that the effect of the conversations attempted to be stated by interested witnesses after a period of four years, was tantamount to absolute refusal to load respondent’s cargo in June, appellant’s case is only brought in line with *Davison v. Von Lingen* and *Gray v. Moore*, supra, where though a cancelling clause was refused when the contract was drawn, the Court held that the date named in the contract there under consideration, namely,—“about 20th of November”, must control. Libelant’s officers knew that respondent wanted cargo space for May or June sailing. They did not refuse to give May or June sailing, nor did they adopt any language excluding liability for the ship’s failure to load in June. They wanted Davis to understand that he was getting “June sailing” which was what he

sought, or, at any rate, "June loading". Davis got all his information from libelant's office and it is significant that his telegram of February 24th asking authority of respondent to sign the contract, transmitted the information undoubtedly obtained from libelant, that Grace & Company could take the 6200 tons "for early June". This was the information upon which respondent authorized the contract which was signed on the following day. Confirmation of what was then understood is found in Davis' telegram of February 27th, and in his letter of March 1st, in which he says, referring to the Steamer Cacique, "the boat is scheduled to sail about the 14th of June" (268). His letter of April 3rd, to respondent, gives the date as "June sailing" (272). Such was evidently his understanding of the arrangement, and that was in line with his instructions. Libelant was aware of Davis' limited authority and also knew that his principal was seeking space for May and June only. Assuming that Mr. Davis would, in the light of his specific instructions, have accepted a contract permitting loading after June, or at some indefinite time when, weather and other conditions permitting, this vessel should return from her proposed Oriental voyage, is it reasonable that Grace & Company, who drew the contract without the advice or assistance of respondent's agent, would have drawn it in its present form, if their undertaking was merely to load the cargo upon the return of the Steamer Cacique from her voyage to Oriental ports? Libelant's of-

ficers wanted as definite a date as the circumstances would permit, because they wanted to collect demurrage in the event of default at the rate of \$3000.00 per day. They thought they could make a June sailing, and they provided in the contract for a June loading, with a reservation that the exact loading date in June would be named later. That is the only reasonable construction that can be placed upon the language used but, if as before stated, there is any uncertainty or ambiguity in the language, it must be interpreted against the drawer, libelant, and in favor of the understanding of respondent, which, as appears in the telegrams and letters above noted, was "June sailing" or at least June loading of the complete cargo.

The statements attributed to Mr. Davis when he was interviewed shortly before the trial by counsel for libelant in the presence of witnesses, were not in conflict with the understanding above mentioned, nor with the testimony of Mr. Davis that he had asked Grace & Company for space for June sailing (326, 324, 328). If there was any conflict between the witnesses as to what Mr. Davis had said in November, 1920, the decision of the Court who saw the witnesses and could judge of their credibility, is decisive (*The Bailey Gatzert*, 179 Fed. 4th; *The Beaver*, 253 Fed. 312, 313; *The Hardy*, 229 Fed. 985). However, if it had been understood, when the contract was made, that the definite date of arrival could not be fixed, that only explains the reason for inserting the clause previously noted, re-

quiring libelant to give notice of exact loading date when vessel is nearer port. That fact gives support to the claim that June was understood to be the loading month, but that the day in June was left open.

The record of the trial is a complete answer to the insinuations, for they are not statements, contained on page 58 of Appellant's Brief. Proctor for appellant had access to, and the use of, all respondent's files so far as known to counsel (264). Appellant's comment on the assumed absence of the communications which passed from respondent to its agent Mr. Davis, prior to the making of the contract, is met by the fact that a portion of such correspondence namely, the telegrams of February 24th and 25th, were obtained by proctor for libelant, from the files produced by respondent, and were introduced in evidence (265). The remaining telegram, that of February 23rd, was discovered later and produced *sua sponte* as counsel would have it, on the last day of the trial (361). From such correspondence, it appears that on February 23rd, respondent asked Davis to "secure space for 4000 tons May and June sailing", and the same telegram indicated that respondent had already provided space for "2200 tons April and May sailing" (361). After seeing Grace, Davis advised respondent February 24th "If you can take 6200 tons for early June can close with Grace" (265); and to that, respondent answered, February 25th, "Accept Grace offer 6200 tons confirm advising

names and dates of sailing” (265). After signing the contract on February 25th, Davis telegraphed and wrote respondent that the contract had been signed, and that it provided for 6200 tons, “to sail about the 14th of June” (268). The omission of this correspondence was stated by Counsel to indicate that respondent did not want “June loading” or “June sailing” and that Mr. Davis’ authority was not limited to securing space for June, and therefore, inferentially, the contract is not to be construed as requiring June sailing or June loading. The evidence is in the record however, and it conclusively shows: That respondent was seeking space for May and not later than June sailing; that Davis was not authorized to secure space for sailing later than June; that he was given to understand that the S. S. Cacique would sail early June afterwards explained as June 14th; that he so advised respondent and that the contract was entered into upon that understanding.

Appellant’s next reliance is upon what is termed “the practical construction given to the contract”. By this is meant the correspondence between respondent and Mr. Davis. It is probably needless to say that, if the contract when it was made, meant that the shipment was to be loaded in June, then it necessarily meant the same thing when the libel was filed, because no change had been made in the contract as between the parties. Consequently, the only relevancy of the correspondence between respondent and its agent, was to show, if possible,

some admission which would serve to undermine respondent's contention that "June loading" required complete loading in June. Though learned counsel has quoted pages of extracts from letters, he has drawn our attention to no statement containing any admission in support of his contention or in derogation of respondent's claim.

The correspondence between the respondent and the Ford Company of San Francisco subsequent to the time when the contract was made, does not contain anything indicating that the contract shall have a different meaning from that which ordinarily attaches to the words used. The *meaning* of the words used in the contract is in no wise affected by that correspondence. In fact both Davis and respondent throughout the correspondence, until their construction was questioned by libelant, treated the contract as one for *June sailing*, which was in line with Davis' authority (266, 268, 270). After that, and in the light of libelant's claims, they insisted that "June loading", if it did not mean "June sailing", certainly required complete loading in June.

In view of the above, any extensive consideration of the correspondence on respondent's part is unwarranted. We will, however, refer to some few matters because their significance has been clearly misunderstood by counsel. The telegrams and letters passing between Mr. Davis and Ford Motor Company show that shipments from respondent's factory were arranged by months. The month was

the unit of shipment in every instance, as may be seen by reference to the correspondence cited by appellant (265, 269, 270, 271). The contract made in May with Peabody & Company for furnishing 542 tons to supplement the Cacique cargo does not affect the meaning of the contract sued upon. At that date, respondent had discovered its shortage of cargo and was contracting to supply as much tonnage as was possible for the vessel. The expression "about July 1" is not inconsistent with "June loading" and certainly is not an admission that would change the import of the previous contract. As was said by the District Court, the expression used by the Southern Pacific in a formal letter written in May to Grace & Company, even though it were also sent to respondent, indicating "June or early July" without stating whether it was sailing or loading, is equally immaterial.

The letter of May 31st referring to the willingness of the Union Steamship Company to release any of respondent's freight remaining after July 1st, for the purpose of enabling respondent to fill its undertakings under the present contract, are the statements of the Union Steamship Company not of respondent. Furthermore at that time, respondent had notice that the steamer could not sail until July, and it was asserting in correspondence with libelant its right to be relieved from damages, if the vessel did not load and clear in June.

The Davis letter of June 13th, expresses the hope that the vessel will be as late as the 10th of July,

and this is seized upon by appellant, as indicating that respondent did not want a June loading or sailing. We realize that counsel is privileged to draw inferences, but only from the facts or the record. The correspondence explains the reason for this hope. Respondent's agent was then disturbed at the apparent shortage in the cargo, and he hoped that the steamer would be late for two reasons. First, because as he viewed the contract, respondent would have been exonerated from damages if it was short on the contract tonnage. Second, he had the prospect of the Union tonnage of which there was a great deal then in San Francisco to draw upon after July 1st, to make up the shortage. In other words, he hoped that since respondent was apparently short on tonnage, some solution of its difficulties might appear if the steamer did not arrive in time to make "June loading" Reference was also made in one letter to the congestion of shipments for Australia, and proctor for appellant has seized upon that. Explanation of the statement is in the correspondence itself. There had been delays on the part of the Union Steamship Company in moving respondent's cargo, and respondent's sales department expressed great concern in behalf of its customers at the fact that apparently so many cargoes of automobiles would arrive in Australia at about the same time. Such expressions were natural in the course of business. They did not actually or in effect touch upon the meaning of the term "June loading" as used in the

contract. The term was impressed with a fixed meaning, complete at the day the contract was drawn. Subsequent correspondence between one of the parties and a third party could not change it. There was no correspondence on the subject as between the parties themselves until the controversial days of June, and therefore the meaning that the term "June loading" had when the contract was signed on February 25th, was the meaning that must be given to it on the day the libel was filed. We have shown, we submit, that "June loading", meant loading in June and nothing else.

IV. ANSWER TO THE ARGUMENT THAT THE LIBEL SHOULD BE SUSTAINED EVEN THOUGH IT WAS PREMATURELY BROUGHT.

We have read and reread the argument of appellant, in the hope that we would, though perhaps we have failed, to get its import. Counsel first complains that the learned District Court held that an action could not be maintained for an anticipatory breach of a contract unless the breach existed when the libel was filed. This is a fundamental rule of law. No contracting party, on any theory of law, can be sued for a breach of contract, before performance on his part is due. Performance is due either at the time fixed and according to the terms of the contract, or damage lies as for a breach of the contract because, before performance was due, the party sued, repudiated the contract entirely

with the result that the injured party elected to take advantage of that renunciation and immediately sue. The burden of proving anticipatory breach is on the party alleging it. If the proof of anticipatory breach fails, the necessary result is that the action was commenced before performance was due on the part of the defendant. Upon no legal principle can such an action survive. The facts are, and they stand practically undisputed, that when appellant filed its libel, the Steamer Cacique was laden with an inland cargo which could not be unloaded, at best, for several days; she was unseaworthy and would not be able to clear the port of San Francisco without a certificate from Lloyds' surveyor; the necessary repairs required that she go into drydock and she did, and was not ready to load until July 12th. She then completed loading on July 26th and sailed that night or the following morning. Under these circumstances, libelant would have had no right to load respondent's cargo and take the vessel into drydock or otherwise deviate from the intended voyage (*The Indrapura*, 171 Fed. Rep. 929).

When the libel was filed, the vessel was not only unable, and not ready, to load respondent's cargo, but the time for loading had not arrived. Under the contract, time for performance or delivery on respondent's part, was to be "as fast as vessel can load". But the exact days of June during which the cargo was to be loaded, were to be fixed by a notice from libelant, stating exact loading dates

when the vessel was closer at hand. In the latter part of June, and before the vessel's arrival at the port of San Francisco, appellant specified June 27th, 28th and 29th as the days upon which it required respondent to deliver the cargo under the contract. When the libel was filed only one-half of the first of these three days had elapsed. Appellant could not thus ask performance on the 29th of June, and sue for breach on the 27th, and no legal principle will sustain an action so instituted.

But why should the libel survive? Would appellant be entitled to claim on some other breach not alleged in the libel, or to amend its libel and set forth a new cause of action, or is appellant's real purpose to be found in the suggestion that it be permitted to withdraw a statement made by proctor for libelant in open Court? A concession or stipulation entered into in open Court is the most solemn form of evidence that can be produced. We are confounded there should even be a suggestion of withdrawing such a stipulation after the case has been tried, submitted and decided.

We are aware that the liberality of the admiralty practice permits the consideration of the case *de novo* in this Court, and appellant might be permitted in a proper case to amend his pleading so as to state his case. But this has not been shown to be a proper case and under the rules of this Court, an application for leave to make new allegations, or to

pray different relief, or to offer new proof is now too late. Withdrawal of evidence so far as our research ~~is~~ ^{has} shown is not ~~presumable~~ ^{permissible} and the reasons therefor are aptly stated in *The Saunders*, 23 Fed. 303, and *Singlehurst v. La Compagnie, etc.* 50 Fed. Rep. 104, 105.

Amendments have been allowed in cases where because of a technical ruling, determined by the appellate Court to have been erroneous, proper evidence was excluded in the District Court, the appellate Court has permitted the evidence to be taken. Such are the facts in one of the cases cited by appellant. In the instant case appellant has no evidence to produce. Nothing that was offered in behalf of libelant's case was excluded in the District Court. It developed its theory of the case to the utmost, and the case failed, as we have shown in the foregoing pages, not because libelant had misconceived or misstated its case in its pleadings, or in its proof, but because on the facts and the evidence produced, it had no case at all when the libel was filed. The District Court in deciding the case took into consideration all the facts, the character of the witnesses, and the situation of the parties at the time, and before and after, the libel was filed. It rendered its decision on legal grounds according to the evidence, and with a view, as expressed in the opinion, to substantiate justice. The conclusions of the Court are sustained by the evidence and are supported by the decisions of the United

States Supreme Court. The questions involved were largely of fact and the rule under such circumstances is that the decision of the District Court will not be reversed except for manifest error.

The Dolbadarn Castle, 222 Fed. 838;

The Hardy, 229 Fed. 985;

The Bailey Gatzert, 179 Fed. 44;

The Beaver, 253 Fed. 312.

We object with all the earnestness at our command to the exercise of any discretion, either in permitting the withdrawal of evidence, or the introduction of additional evidence, or the amendment of the pleadings on this appeal.

The libelant deliberately sought by a hasty libeling of respondent's goods on the plea of anticipatory breach, to obtain an advantage in the way of damages, to which it was not entitled. It was not entitled to sue or to claim damages because the time fixed by it for performance had not expired, and also because its vessel was unseaworthy, and could not load until she had gone into drydock and undergone repairs. Knowing these facts, appellant verified a libel that falsely stated that libelant's vessel was ready to load this cargo. Libelant's manager admitted on the witness stand that this was impossible, and that he knew it when he verified the libel. Appellant, therefore, was masquerading under false colors and is not in a position to ask this Court to exercise a discretion in its behalf.

On the merits we submit that the decision of the District Court should be affirmed in every particular with costs.

Dated, San Francisco,
October 17, 1921.

Respectfully submitted,

W. F. WILLIAMSON,
Proctor for Appellees.



No. 3721

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

W. R. GRACE & COMPANY (a corporation),
Appellant,

VS.

FORD MOTOR COMPANY OF CANADA, LTD. (a
corporation) and ROBERT NETTLEFOLD,
Appellees.

Upon Appeal from the Southern Division of the United States
District Court for the Northern District of California,
First Division.

REPLY BRIEF FOR APPELLANT.

ANDROS & HENGSTLER,
LOUIS T. HENGSTLER,
F. W. DORR,

Proctors for Appellant.

FILED

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REPLY BRIEF FOR APPELLANT.

**FIRST: AS TO THE "STATEMENT OF THE CASE" IN BRIEF
FOR APPELLEES (pages 2-12).**

1. On page 4 of the Brief respondent says:

"On May 1, 1916, respondent wired Ford Motor Company at San Francisco that 5658 tons would be sent forward for shipment under this contract."

No reference is given to support this statement.

Even if it were true, and the intention so expressed had been carried out, this would not be a

compliance with the contract; for the contract called for 6200 tons.

But we find nothing in the record to support the statement. On the contrary, respondent sent to libelant, on May 18, in answer to an urgent wire, the information that it would send 763 tons for Sydney, 1190 tons for Wellington, 2017 tons for other ports, and 116 tons of parts, making a total of 4086 tons, adding:

“This is complete Cacique cargo.” (129)*

2. On the same page of the Brief counsel states:

“which it was then thought would make up the complete tonnage required under this contract”.
(citing pages 280-283-284 of the Apostles)

The record clearly shows the contrary.

Respondent says, in a letter to its San Francisco agent, dated May 4, 1916:

“We have intimated to you that we cannot take the whole amount of the cargo on the Cacique.” (280)

The San Francisco agent, in a letter to respondent, dated May 12, 1916, says:

“We are still shy a cargo for this ship.” (283)

In another letter of the same date, this agent informs respondent that it had contracted with Henry W. Peabody & Co. to supply cargo for 542 tons of its Cacique space, and adds:

* Figures in parentheses refer to pages in Apostles.

“If you can supply the rest of the cargo making up the 6200 tons, there will be absolutely no loss on this contract.” (284)

3. On pages 4-5 of the Brief respondent says:

“When respondent discovered this shortage, and while the shipments were en route to San Francisco, respondent, on May 25, 1916, directed Traffic Manager Davis of the Ford Motor Company of San Francisco to borrow 1500 tons from shipments previously made to San Francisco for transport on the Union Steamship Company’s steamers, * * * Efforts to borrow the 1500 tons failed on June 1st, which still left respondent short 1500 of the 6200 tons contracted for in the contract in suit.”

The fact is that respondent admits that, in spite of its contract, it “*had not assumed that we were going to be held for 6200 tons space*” (286), and had,

“made certain space engagements for May, for which we received a very advantageous rate by the New Zealand Shipping Company out of Montreal, a rate of \$35.00 per ton” (276).

thus

“taking a considerable number of cars which otherwise would have had to go by Steamer Cacique.” (316)

It is an indisputable fact that respondent yielded to the temptation of giving a part of the Cacique cargo to the cheaper carrier, thus making a considerable saving,—provided that it was not going to be held to its contract. Respondent did not “discover this shortage,” (Brief p. 4) but *caused* it personally and deliberately, actuated by the double mo-

tive of self-interest and indifference to its contractual obligations.

4. On June 1st respondent wrote to libelant (among other things) that respondent

“had effected an arrangement with the Union Steamship Company to transfer to you 1500 tons of the tonnage now on the Coast originally contemplated to go forward by Union Steamships.” (49; also Appellants’ Brief, p. 5)

On the same day respondent received a wire from Union Steamship Company:

“*We cannot give any of these cars to Grace Company.*” (298)

The day before (May 31), respondent had received a wire from its agent:

“Union Company say all cars at present here will leave Coolgardie June 1st., Waimarino or Floridian end of June. *Any cars here after July 1st they will give to Grace.*” (293, 294)

The following inferences may be fairly drawn from these facts:

a. If the letter sent by respondent to libelant was written *before* respondent had received the wire from Union Steamship Company, then the statement in the letter, above cited, was in fact *untrue*.

b. The letter sent by respondent to libelant was in all probability written *after* respondent had received the wire from its San Francisco agent, and in that case it shows that the cars which respondent offered to libelant in fulfillment of its contract were cars which would arrive in San Francisco *after July 1st*.

This makes clear respondent's statement in the same letter:

"We wish it, therefore, definitely understood that if by reason of the above and other circumstances *our plans for supplying 6200 tons for this vessel do not carry through*, we do not consider our obligation binding." (49)

Part of these plans for supplying 6200 tons was to get from the Union Steamship Company 1500 tons *arriving in San Francisco after July 1st*. If they should so arrive, the contract would be binding; if not, then "we do not consider our obligation binding."

Respondent's correspondence discloses and demonstrates, therefore, first, the untruth of the statement "that it was respondent's understanding that the Steamer Cacique would leave on June 14th, and again that it would sail June 24th, and *that its plans had been made accordingly*" (Brief, p. 5); and, second, the "June loading" or "June sailing" sophistry which was adopted, as an afterthought, as a defence to respondent's breach of contract. The truth is that respondent's plans had, on June 1st, been built upon supplying part of its Cacique cargo, after July 1st, from this source.

5. *Respondent's letter of June 14th* (Brief p. 6) The Brief does not present a fair reflection of the effect of this letter. A reading of the letter (50, 51) will satisfy the court that it contains:

(1) a flat repudiation of "any arrangements for 6200 tons", in other words, a flat repudiation of the contract;

(2) a statement that respondent *has* forwarded 4075 tons of cargo for the Cacique, and that it *will not* forward more.

(3) an offer to libelant to make a new contract of affreightment for 4075 tons, on condition that libelant waive the contract for 6200 tons.

(4) a threat that respondent will decline to load any cargo if libelant insists upon its contract for 6200 tons.

(5) a *present* implied declaration that respondent has already breached its contract by not forwarding the balance of 2125 tons necessary for the contemplated Cacique voyage under the contract.

6. *Libelant's letter of June 22nd* (Brief p. 7). Libelant admits, for the purpose of this appeal, that libelant did not, in this letter, state respondent's legal obligations correctly, and that, under the contract, it was only incumbent upon respondent to deliver the 6200 tons at San Francisco as fast as the vessel could load. On the other hand, libelant contends that it was under no obligation to load the vessel in June; that a loading in July satisfied this contract. Libelant's notice of June 22nd was merely evidence of a desire to meet, if possible, respondent's erroneous contention for the purpose of avoiding a conflict with respondent.

7. *The 1100 packages delivered by respondent on libelant's wharf.* After the Southern Pacific Com-

pany had deposited 1100 packages (about 1500 tons) on libelant's wharf Mr. Davis, agent for respondent, instructed the railroad company not to deliver (until advised to do so) "under any circumstances any of the cargo at present on hand booked Steamer Cacique" (304, 305).

The Southern Pacific Company thereupon advised libelant "that the delivery of that cargo to the Cacique had been held up, on instructions received" (318); that "some of this freight was delivered to the wharf after they received this notice" (319); that "this cargo then on the dock had been delivered by them by mistake, and they wanted it returned" (321). On the forenoon of June 27 the Southern Pacific Company advised counsel for libelant of the instructions received by respondent, sending at the same time the original letter of instructions.

Respondent states (Brief p. 7) that the 1500 packages were delivered "for shipment by the Cacique, and they were so received by libelant." While originally so delivered by respondent, it must be remembered that the delivery was qualified by respondent's insistence that they were Cacique freight only under the proposed 4075 contract and not under the contract in suit; that they were delivered simultaneously with a notice advising substantially: They *are* for shipment by the Cacique only if you accept the new, less favorable, contract which I propose. Libelant, on the other hand, did not receive them under the new, and less favorable contract proposed by respondent,

which it rejected, nor could libelant receive them under *this* contract, having been notified by respondent that this contract was repudiated.

8. Respondent, on page 9 of the Brief, emphasizes the fact that “no cargo was loaded, nor was attempt made to load any, until July 12th”. While this is true, it will be proper, in this connection, to consider that the very controversy raised by respondent had the natural consequence of delaying the loading. It is not claimed by us that the whole cargo, had it been offered, could have been completely loaded in June; but loading might have commenced considerably before July 12th, but for the complications introduced by respondent’s refusal to carry out its contract.

9. *The arrival of the Cacique in port.* Counsel calls our attention to an inadvertent statement relative to the hour of the Cacique’s arrival in port, on June 27th. We accept the correction. The Cacique docked at her wharf at 7:30 a. m. and the libel was filed, and the goods attached, in the afternoon of the same day.

**SECOND: REPLY TO APPELLEES’ ANSWER TO THE STATEMENT
THAT THERE WAS AN ACTUAL BREACH OF THE
CONTRACT.**

The principles governing the instant case are, we believe, correctly stated in *Anson on Contract* (3d American Edition by Corbin), page 445, as follows:

“It is probable that in the United States there is *no difference* in legal effect between repudiation before the time set for performance and repudiation after that time. A *total* repudiation by A, i. e., an unconditional refusal by A to perform the acts required by his duty, always justifies B in refraining from going on with performance on his part; and this is true whether B has begun his performance or not. This means that B is discharged from his previous legal *duty* to perform; he is *privileged* not to perform. In both cases also B remains *privileged* to go on performing. * * * In like manner B’s immediate *right* to damages does not depend upon whether A repudiates prior to the time set for his performance or afterwards. According to the overwhelming weight of authority, B has such an immediate right in either case.”

Although respondent’s agent had informed libellant, in his letter of June 24, “*that 4075 odd tons is the full cargo for the steamer Cacique, and that they recognize no contract binding upon them to forward 6200 tons on this vessel*” (109), respondent states (Brief p. 12) that “Respondent had in San Francisco on June 27th for shipment on the vessel Cacique not 4075, but 4650 tons.” In this connection respondent’s answer refers to “its shipment of 4075 tons” (39).

On page 13 of the Brief respondent criticizes “appellant’s statement that the Southern Pacific * * * delivered a portion of the cargo to appellant”. We refer to respondent’s answer which “alleges that the said Southern Pacific Company, on the 23rd and 24th days of June, 1916, *delivered into the cus-*

tody of libelant, on Pier No. 26, approximately 1115 packages'' (32).

Respondent states (Brief p. 13) that the notice to the Southern Pacific, on June 22nd, not to give any cargo to libelant, "was given before performance on respondent's part was due". This is a mistake; it was given *during* performance on respondent's part; for respondent started performance of the Cacique contract on May 1st (315).

Respondent criticizes our contention that the goods were stopped by respondent "in order to compel the making of a new contract". We think this contention is well supported by respondent's letter of June 14, advising libelant that 4075 tons is the entire cargo that would be forwarded; that if libelant wished to accept it on respondent's terms, it could do so; but if it insisted upon the 6200 tons, respondent would "decline to load any of the cargo whatever" (50).

We also think the statement "that libelant was notified not to touch respondent's cargo, or to prepare it for loading on the Cacique" is a justifiable inference from the notices given by the respondent to the Southern Pacific Company. In this connection Mr. Carter testified, on cross-examination:

"Q. When you sent that wire did you know that there were 1100 tons of freight on the dock—1100 packages?

A. It is quite probable, but we also knew that the Ford Motor Company had instructed the railroad not to deliver the automobiles, and the

automobiles had been delivered by mistake by the railroad.

Q. They were, none the less, there?

A. Yes, they were there.

Q. Ready, as you say in your libel, to be loaded on a ship?

A. Yes, providing we were not prevented by the Ford Motor Company.” (229)

Coming now to respondent’s consideration of libelant’s argument (Brief for Appellees, p. 14), counsel maintains that, to sustain our claim,

“it was necessary for appellant to show that performance on respondent’s part was due on June 27th, and that libelant was ready, able and willing to perform its obligations”.

Appellant is prepared to accept counsel’s challenge, and to show:

- (a) that performance on respondent’s part was due on June 27th, and
- (b) that libelant was ready, able and willing to perform its obligations.

(a) Due performance on respondent’s part, on June 27th, required that respondent should have ready 6200 tons of cargo—perhaps not actually at the port of San Francisco, but at any rate so near to the Cacique’s wharf as to constitute cargo for her next impending voyage. It may be even admitted that respondent, by the demurrage clause, had bought the ship’s time for a few days, and that a reasonable detention caused by waiting for some of the cargo would not have been a breach, by respondent, of the contract. But the facts show that re-

spondent had no 6200 tons available which could be made into Cacique cargo for this voyage, and that it had notified libelant that it never intended to provide 6200 tons for this voyage. Respondent had, before June 27th, repeatedly, and expressly, refused performance of that which was due to libelant, under its contract, on June 27th.

Counsel admits that

“Respondent’s obligation was to deliver alongside the steamer ‘as fast as vessel can load’ 6200 tons of automobiles in packages” (Brief p. 15), and also admits

“respondent’s *apparent inability to deliver the full tonnage contracted for*, under the terms of the contract” (ibid.).

Surely counsel could not claim, in the face of the facts, that respondent, on June 27th, had fulfilled this admitted obligation to deliver 6200 tons of automobiles alongside the steamer ‘as fast as vessel can load’, knowing that respondent, by giving part of the Cacique cargo to cheaper vessels, had made it impossible to provide the agreed cargo for the Cacique.

(b) On June 27th libelant was ready, able and willing to perform its obligations. This point involves, in part, the construction of the contract which will be discussed more fully hereafter.

The District Court finds that

“*libelant* was at all times willing and eager to carry out the contract, while respondent was not

willing to furnish more than 4075 tons of the 6200 tons contracted for” (449),

and also finds that

“On June 27th, however, the *Cacique* was not ready to take on cargo, and could not have been made ready to do so” (450) (meaning: ready to do so on June 27th).

The court, therefore, finds that *libelant* was ready, able and willing to perform its obligations on June 27th, but that the *Cacique* was not then ready to take on cargo. We contend that it is immaterial, under the contract, that the steamer was not ready to load on June 27th. Even the notice given by libelant to respondent, on June 22nd, that the vessel would arrive on June 27th, and that the delivery of the 6200 tons must commence on June 27, does not state, or intimate, that the *Cacique* would be ready to load on June 27th. Referring to the statement that delivery must be completed not later than June 29th, we admit that *this* was a requirement not justified by the contract, and that respondent was within its rights to claim that cargo delivered after July 1st was proper *Cacique* freight under the contract.

Counsel argues that respondent could in no event be in actual default until the 29th day of June had elapsed (Brief p. 16). But the facts clearly show that respondent *was in actual default* on June 27th; for, on that day, respondent had *not* 6200 tons ready for this *Cacique* voyage (by its own admission), having made it impossible to get them ready for this voyage.

Counsel assumes that “inability of the steamer to load,” on June 27th, is equivalent to libelant’s inability to perform the obligations of the contract. This assumption involves the construction of the contract, a question not involved in the decision of the District Court, although it is the heart of this controversy.

The filing of the libel was *not* “in advance of the time when performance was due on respondent’s part and, therefore, in advance of an actual breach of the contract” (last paragraph, page 17 of the Brief). Performance was not merely the loading, nor merely the delivery of this cargo of 6200 tons; the performance due on defendant’s part, on June 27th, was the duty to have 6200 tons of automobiles in such a position as to have them available for loading on the Cacique. Respondent cannot help admitting, and indeed does admit, its “apparent inability to deliver the full tonnage contracted for.”

There was an *actual breach*, by respondent, on June 27th. It had previously made it impossible to perform and thereafter had notified libelant that it would not perform, and the actual breach *continued* down to the time of the filing of the libel. At that time respondent had not performed its obligation, due after arrival of the Cacique, to have 6200 tons available for her next voyage. Respondent admits that, “had there been an actual breach, the (1500) packages could have been so (in rem) attached” (Brief, p. 18).

On page 18 respondent states (for the purpose of producing some effect which we are unable to understand) that “the verified libel charges that these packages were delivered in part performance (11).” A reading of the libel proves that this is not true.

Respondent epitomizes its argument in the sentence: “The time for *performance or delivery* on respondent’s part had not arrived, when the libel was filed” (Brief, p. 18). This shows the fallacy in the argument; for granting that the time for *delivery* on respondent’s part had not arrived, the facts show that *performance* on respondent’s part was commenced on May 1st, and that the time for making the shipment of 6200 tons ready was long overdue on June 27th.

THIRD: REPLY TO APPELLEE’S ANSWER TO THE ARGUMENT THAT RESPONDENT COMMITTED AN ANTICIPATORY BREACH.

The District Court decided this case on the ground, that, at the time the libel was filed, there was no actual breach of the contract by respondent, the libel having been filed prematurely, and that, if there was a previous anticipatory breach, it had then been waived by libelant’s acceptance of a part performance under the contract.

This decision does not involve a consideration of the fundamental question, upon which this controversy turns, viz., the *construction of the contract* between the parties.

We are, therefore, justified in maintaining that this case was not disposed of upon its merits, but was decided on technical grounds. We respectfully submit that the principles underlying the decision should have no room in a court of admiralty in any case, least of all in a case which shows so deliberate and ruthless a disregard of contractual obligations as is disclosed by the facts of this case.

The reference, in our Brief, to counsel for respondent is criticized by the proctor on this appeal as "most unusual." The original proctors for respondent were Mr. Williamson, Messrs. McCutchen, Olney & Willard, and Messrs. Pillsbury, Madison & Sutro (17, 19, 57). The last mentioned firm withdrew from the case at an early stage, and the case was tried on behalf of respondent by the senior member of the firm which filed its withdrawal from the case in this court, while this appeal was pending. We trust that the reference to Mr. McCutchen in our Brief will be understood in the sense in which it was intended, viz. as an expression of the writer's admiration of his great ability. We do not admit that libellant's view of its proper remedies against the thirty carloads of automobiles delivered on its wharf was, under the circumstances, erroneous, the ship and the automobiles, a wrongdoing *res*, being then sufficiently connected for a proceeding *in rem*; but however that may be, and assuming that this court would not agree with us on this proposition, we contend that even a mistaken view of our remedies should not be permitted to defeat a

claim which is founded upon principles of equity and justice, and which grew out of respondent's greedy and callous disregard of the obligations of its contract. *If* an amendment of the libel were necessary at this stage, to conform with facts ascertained at the trial, it would aid substantial justice and would work no prejudice to respondent. Counsel is mistaken in making the statement that appellant had knowledge, when the libel was filed, of all the facts which were subsequently disclosed at the trial. The legal status of the 30 carloads of automobiles deposited on libelant's wharf was sufficiently anomalous to excuse a false step in enforcing libelant's remedy (*assuming*, without granting, that libeling them *in rem* was in law a false step). According to respondent's contention these automobiles were originally delivered into libelant's custody as cargo for the Cacique, on the 23d and 24th days of June, 1916 (32, 33). Afterwards, and after the Cacique had arrived, on the 27th of June, respondent finally stopped their delivery and attempted to withdraw them from libelant's custody. They could not be attached by process of foreign attachment (as were the remaining 150 carloads), because they were then in libelant's custody.

But granting, for the sake of argument, that process *in rem* against the 30 packages delivered into libelant's physical custody was the wrong remedy, it would not follow that libelant, by attaching them *in rem*, accepted them as a part performance of the contract. The proper deduction

would be the contrary conclusion, that libelant attached them *because* they, and their owner, were wrongdoers, having breached the contract. The new legal relation that had arisen between libelant on the one hand, and these goods and their owner on the other hand, was predicated upon the existence of a *breach* of the contract, which gave libelant a right of action against the goods or their owners, and not upon an assumption that the contract continued in force. When libelant attached the goods, it did so because the contract was breached, and in the enforcement of a remedy for the breach. In other words, the attachment of the goods was an unequivocal election to consider the contract breached.

Respondent charges that libelant, on June 26th, “deliberately stated its readiness and ability to perform the contract according to its terms” (Brief, page 24). This is true, and it is also true that libelant *was* ready and able to perform it according to its terms, as libelant understood them, and as we believe the court will construe them.

Respondent also claims that libelant then “stated that it *would* accept respondent’s cargo as *part performance* of the contract, but not as a complete performance.” But a reading of the letter demonstrates that libelant said no such thing. It said:

“We do not accept such smaller quantity as a full *satisfaction* of the contract of February 25th, but as the *partial satisfaction* which it, in fact, is.” (Brief, p. 25.)

The word "satisfaction" connotes the breach, and not the continued existence, of the contract. The situation was this: Respondent had given notice to libelant, on June 14th, that it did not recognize any contract for 6200 tons; that if libelant wished to accept 4075 tons as the entire cargo for the Cacique, it could do so; but if it relied upon a contract for 6200 tons and attempted to hold the 4075 tons as a remedy for the breach of the contract to deliver 6200 tons, respondent would not load any cargo whatever. Libelant's answer to this letter is entirely consistent with an understanding and election, by libelant, that the contract was *breached*. Its letter was an insistence upon all the secondary rights flowing from respondent's breach. It refused to accept the 4075 tons as a full satisfaction for the breach of the 6200 ton contract, and accepted the 4075 tons only as a partial satisfaction for the breach. This is made still clearer by the fact that, in an earlier part of the letter, libelant says, in effect, that it will take the 4075 tons offered, but will "*hold you responsible for all damages, including demurrage, which we may ultimately sustain by reason of any breach of said contract.*"

Respondent argues that this letter "definitely announced that no anticipatory breach would be accepted" (Brief, p. 25). In our opinion it announced, definitely, the exact opposite; it refers to respondent's breach of contract, claims damages therefor, and demands full satisfaction of its claim for damages. This could be considered a demand

for performance only in the sense that libelant, after breach by respondent, insisted upon the performance of its secondary rights, resulting from the breach. A contract between two parties always remains alive, after breach, until the injured party has enforced its secondary rights and received full satisfaction for his damages.

Respondent exaggerates the unseaworthiness of the Cacique when she arrived in port. He says: "The vessel was unseaworthy when she reached this port" (Brief, p. 25), which is true, and he then adds: "and at all times until July 12th" (Brief, p. 26), of which there is no proof. She did begin to load her outward cargo on July 12th; but the court may properly infer from the facts surrounding so serious a breach in the delivery of her cargo that some of the delay, after the breach, was due to the default of respondent. We contend, however, that a loading of the Cacique, even on July 12th, was within the terms of respondent's contract.

Respondent speaks of "appellant's change of front." We do not believe that this is intended to be a serious argument, as the correspondence, and all the facts, show so unfaltering a consistency on the part of appellant, that the District Court was bound to make the one favorable finding for libelant, that "*libelant was at all times willing and eager to carry out the contract*" (449). And is there anything in the record to show why in reason appellant should not have carried out this contract?

On page 27 of the Brief an argument begins which is predicated upon the fact that libelant did *not* load respondent's 1100 packages, then on libelant's wharf, *on June 30th*. Evidently respondent, while evolving this argument, had forgotten that the libel for breach of contract had been filed on June 27th. It is stated that "this course was taken in the hope that, by so doing, appellant would escape the effect of its own inability to load respondent's cargo, or any part of it, in the month of June." The fact is that appellant could have loaded some of the cargo (although not a substantial part) in June; but our contention is that, as a matter of law, it was not necessary to load any part of it in June; that any endeavors made by libelant to accomplish a loading in June were made for the purpose of avoiding a costly controversy with an unscrupulous contractant who had frequently indicated a disposition to cling to subterfuges in order to rid itself of a contract which had proved financially unprofitable after charter rates had come down.

Respondent charges that appellant's libel, filed some hours earlier than 9 p. m. of June 27th, was false in stating that libelant was then ready to perform its contract. This charge involves a construction of the contract. If libelant's construction is correct, the allegation is correct (see article IX of libel, apostles, p. 13, for the exact form of the allegation). Libelant's conduct, at and about the time of filing the libel, is absolutely consistent with libelant's contention that a July loading satisfies this contract.

Respondent professes to deduce “the intention and the understanding of the appellant to stand upon the contract as still in force” from a letter and a telegram of June 28th (Brief, p. 32). Evidently he has forgotten that, *on the previous day*, libelant had commenced this action for breach of contract and had thereby indicated, in an unequivocal way, its understanding that the contract was not in force, except as to the remedies for its breach. To support the argument, respondent cites the following question and answer, in Mr. Carter’s cross-examination:

“Q. And you intended to tell the Ford Motor Company in that letter that that contract was still in force as to the demurrage for \$3000 a day, did you? A. Yes.” (162)

Certainly the contract was in force *in so far as libelant still had the legal remedies for its breach*. If this were not so, the commencement of every legal action for a breach of a contract would be an admission of the continued life of the contract, and therefore, a waiver of the breach, and the injured party would, by the mere act of commencing the action, at the same time defeat his action.

It is argued (Brief, p. 34) that respondent’s letters to the Southern Pacific Company

“do not repudiate the contract or refuse to perform the same. Without referring to the contract at all, they merely *request* that deliveries be *delayed* until respondent directs them to be made.”

The gist of the letter of June 22nd is: “do not, *under any circumstances*, deliver any of the cargo at present on hand” (262). At the same time respondent’s agent notified libelant that “they recognize no contract binding upon them to forward 6200 tons on this vessel. Also that, *unless* the 4075 tons is *taken on this understanding*, and not subject to freight for 6200 tons, they request that *we withhold loading any of this cargo*” (109). If, therefore, the letter to the Southern Pacific Company was a “request that deliveries be delayed,” the expressed intention was *to delay until libelant would submit* to the insolvent proposition to surrender its good contract in consideration of receiving a poorer substitute—a proposition which was immediately, and at all times, rejected by libelant. “Do not deliver until you are authorized to do so” means, therefore, in the light of the surrounding circumstances: “Do not deliver until libelant submits,” or: “Do not deliver under *this* contract.”

On page 36 of the Brief there is an attempt to show that the libeling of the packages *in rem* was not the enforcement of a remedy following a breach of the contract. The attempt is again predicated upon the assumption that, on June 27th, performance on the part of respondent “was not due.” By what magic could respondent—presuming that it is subject to the laws of nature—be ready to load 6200 tons in the Cacique for her impending voyage, when it had only 4075 tons within reach and had deliberately refrained from providing, and re-

fused to provide, the remaining 2100 odd tons, and had, furthermore, offered these 4075 tons with the qualification: you take these under a new contract which I offer you, or you get nothing at all? In answer to the constant reiteration of the argument that the use of the words “partial *satisfaction*”, by libelant, constitutes an *acceptance of a partial delivery* under the contract, we are again compelled to call attention to the obvious fact that a “satisfaction” can arise only *after* breach; that it comes into existence by and through a breach, and that, if one party to a contract says to the other: “I am willing to accept your offer as a partial satisfaction,” he implies thereby his understanding that a *breach of the contract has been actually committed*.

On page 37 of the Brief respondent returns to the libeling *in rem* of the packages which had been delivered into libelant’s possession as a part of the cargo which had been originally intended to be applied under the contract of February 25, 1916.

We will re-state our position on this phase of the case: These packages could not be reached under the process of foreign attachment, because they were not in the hands of a third party, but had been delivered into the custody of libelant. They were originally delivered by respondent as Cacique cargo. They were on libelant’s wharf, on June 27th, and the Cacique was then lying alongside that wharf. Respondent had just signified its final determination to repudiate the contract, and had notified libelant that these packages were *not* to be considered as

cargo under the contract, but should only be used by libelant under another contract then proposed by respondent. At the same time the Southern Pacific had advised libelant that it had been instructed not to deliver any of the cargo under any circumstances. Under these circumstances libelant decided that the Cacique and the 1100 packages on her wharf had assumed such relations as to give rise to a mutuality of liens as recognized by the maritime law, and accordingly attached the 1100 packages *in rem*. We contend that libelant was justified by the facts in doing so, and that this attachment was not evidence of a recognition that the contract continued to live, but was just the opposite, viz.: Evidence of an election to seek a remedy for the breach of the contract.

Even if the relation between these 1100 packages, on the wharf, and the Cacique alongside, had not progressed to the stage where mutual liens had arisen, the packages had been delivered to the ship-owner, and the latter had a right to retain them in mitigation of the damages for the breach of the contract by respondent. As was said by the Supreme Court, in the case of *4,885 Bags of Linseed*, 66 U. S. at 112:

“Undoubtedly the shipowner has a right to retain the goods until the freight is paid, and has, therefore, a lien upon them for the amount; and as contracts of affreightment are regarded by the courts of the United States as maritime contracts, over which the courts of admiralty have jurisdiction, the ship-owner may enforce

his lien by a proceeding *in rem* in the proper court. But this lien is not in the nature of a hypothecation, which will remain a charge upon the goods after the shipment has parted from the possession, but is *analogous to the lien given by the common law to the carrier on land.*”

As has been shown by this court in the recent case of *The Saigon Maru*, 272 F. 799, the lien of the ship on the cargo for freight, and the lien of the cargo on the ship, are generally, but not always reciprocal. Just as a lien may arise against the vessel before the vessel would have a lien against the cargo, so also may a lien arise against the cargo before the cargo would have a lien against the vessel. Such a lien arose in the instant case, by the original delivery of the 1100 packages to libelant under the contract.

The 1100 packages could be attached *in rem* either as a wrong-doing *res*, which, although delivered to libelant under the contract as freight, threatened to withdraw as such; or they could be attached *in rem*, because libelant had acquired a *jus in re* against them for the payment, by their owner, of the freight lien.

From either point of view the attachment *in rem* was a correct proceeding; but from no sound point of view could it be interpreted as evidence that libelant was continuing a contract which it *knew* had been breached by respondent in fact.

The learned counsel for respondent affects (Brief, page 37) to understand our argument as an attempt

“to claim ignorance of the practice and the law applicable in cases of this impression.” We have been misunderstood; we have not intended to make such a claim. We will say again that, in our opinion, the relation between the Cacique alongside her wharf and the 1100 packages delivered to her owners and deposited on the wharf was such as to give rise to a mutual lien for the performance of the contract which brought ship and cargo together.

At the same time, while disclaiming ignorance, we also disclaim infallibility. If the court should not agree with us, and should decide that, under the circumstances of this case, libelant held no lien on the 1100 packages for the damages resulting from respondent's breach of contract, we contend that the effect of such a decision would not be fatal to libelant's action. The attachment against these 30 carloads of automobiles would be annulled, but the process of foreign attachment sued out against the other 150 carloads in the custody of the Southern Pacific Company, and not yet delivered into libelant's custody, would leave this case properly within the jurisdiction of the court. Respondent could have had the attachment against the 30 carloads set aside; but the effect would not have been to dismiss the libel, or to disturb the jurisdiction.

The seizure by process *in rem* of these packages “indicates the understanding and the intention of appellant” that these packages were a wrongdoing *res*; that they had breached the contract, and that libelant accepted the breach as a breach.

On page 38 of the Brief counsel again refers to a "partial performance counted upon in the libel." We do not understand the reference, unless it should apply to the words "and ready for shipment thereon," in article VIII of the libel (13). From the alleged fact that the 1100 packages on the wharf of libelant were physically ready for shipment, it would not follow, however, that respondent intended them to be shipped at the time when the libel was filed: The contrary appears to be the fact. They were then a wrong-doing *res*. Nor would it follow that libelant, after receiving stop notices from both respondent and the Southern Pacific Company, was ready to ship them in performance of the contract. Certain it is that respondent did give notice to libelant, and to the Southern Pacific Company, "that such cargo was not to be used under the original contract" (Brief, p. 38).

Referring to the criticism, in the Brief, of *Tri-Bullion Smelting Company v. Jacobsen*, the statement is made: "The case did not involve an anticipatory breach" (Brief, p. 41). This is answered by the following citation from the case:

"Viewed, however, as an *anticipatory breach*, the action of Jacobsen in writing the letter of July 8, 1913, *insisting that Tri-Bullion should carry out this contract*, did not, in any manner, cure such anticipatory breach of Tri-Bullion."

Counsel says (Brief, p. 43):

"The correspondence set out in the record clearly shows that respondent was endeavoring *to secure sufficient cargo to meet the contract obligations.*"

The correspondence speaks for itself. "Sufficient cargo to meet the contract obligations" was 6200 tons. It is true that respondent, in its letter of June 1st, "*announced* that it had effected, as was thought to be the fact at that time, an arrangement to borrow the short tonnage from its shipments then in San Francisco for movement on the Union Steamship Company's steamers" (Brief, p. 44); but unfortunately for respondent the announcement itself which respondent so made was not true.

On pages 44-46 of the Brief respondent rehearses again "three circumstances" relied upon for the purpose of showing that appellant "did not accept the tendered renunciation:"

First. The letter of June 26. Our answer to this argument is: The language, "We stand strictly upon the contract made with you and insist upon your fulfillment of the same in every particular" referred to and rejected respondent's impertinent proposition that libelant accept 4075 tons in the place of 6200 tons contracted for. The statement that appellant declared "its willingness to accept the smaller quantity of automobiles offered by respondent in the letters referred to" (Brief, p. 45) is a flagrant misconstruction of the contents and purport of a letter which expressly holds respondent "responsible for all damages" sustained by the breach of the contract to supply the larger quantity.

Second. The attachment of the 1100 packages of respondent's cargo by process *in rem*.—We have shown that the seizure of these packages does *not*

evidence the understanding and intent of appellant that such packages were in its possession “as part performance”, but that it does evidence the understanding of appellant that the owner of the packages, after having delivered them into libelant’s possession, had breached the contract with libelant, and libelant’s determination, consequent thereon, to resort to an effective remedy for the breach.

Third. The telegram of June 28th.—In the first place a telegram on June 28th could throw no light upon the question, whether the contract was alive on the previous day. In the second place, A’s notice to B that he claims agreed damages against B for the latter’s breach of contract is not a reliance upon the continued life of the contract. On the contrary, such a notice is predicated upon the contrary understanding, viz., that the primary obligations of the contract are dead by reason of B’s breach, and that, as a result of this breach of the contract, A claims the secondary rights agreed upon in the contract.

The application of the rule cited by counsel from *Wells v. Hartford Manilla Co.*, on page 47 of his Brief, may be countenanced by appellant without apprehension; for it seems clear to us,

First. That respondent’s renunciation was so distinct that its purpose is manifest, and so absolute that the intention to no longer abide by the terms of the contract is beyond question. Granting, for the sake of argument, that a mere threat to repudiate a contract some time

in the future is not such a renunciation as would entitle libelant to treat it as a breach, the facts show that respondent, in addition to announcing: "I will not load 6200 tons under any circumstances; I will load nothing, unless you accept 4075 tons," also exhibited plainly its present disability, and the impossibility of loading 6200 tons, both caused by its own act in the pursuit of its self-interest. The announcement referring to what it *would not do in the future*, coupled with the clear showing as to what it could not do in the present, constitute the renunciation and breach.

Second. Libelant thereupon treated the renunciation as a breach and sued for damages. The filing of the libel was conclusive evidence of its election to treat respondent's conduct as a breach. The respondent's final declaration, coupled with its obvious disability, were brought home to libelant just before it filed the libel. Even *if* libelant's acts, on June 25th and 26th, *had* constituted a waiver of respondent's breach (which is denied), the facts show that these acts were followed by a renewed breach, on June 27th, which was at once accepted as such by libelant.

A final word on the question, whether the facts in this case constitute an anticipatory, or an actual breach of contract by respondent: Respondent said in effect, on June 1st: "I recognize no binding obligation to supply 6200 tons," and on June 14th: "I

will load no cargo whatever, unless you accept 4075 tons instead of 6200 tons.” This attitude was maintained down to June 27th. At the same time libelant was informed that respondent had no present ability to perform its contract, having in fact never made 6200 tons available for Cacique freight. These facts constitute a present breach of a future obligation, viz., the obligation to *load* 6200 tons in the Cacique for her impending voyage; but they also constitute a present breach of a present obligation, viz., the obligation to have then available 6200 tons for the Cacique voyage. It thus appears that the facts show both an actual, and an anticipatory breach of the contract by respondent. During the last few days before filing the libel the libelant could not, and did not, insist upon performance of the full contract; for libelant then knew that respondent, by its own acts, had made performance impossible. Its object was, to receive satisfaction for the breach. Its request for cargo was in performance of a secondary duty predicated upon the previous breach of the contract, viz., the duty to mitigate the damages caused to libelant by respondent’s default.

**FOURTH: REPLY TO APPELLEE’S ANSWER TO THE ARGUMENT
ON “CONSTRUCTION OF THE CONTRACT”.**

The clause of the contract is: “*Shipment: Per American S. S. Cacique June loading.*” (47)

The question is: What did the parties to this contract understand by the three words: “*Cacique June loading*”?

The question is *not*, as counsel represents, what is the meaning of the words: “June loading.” To make such a representation plausible, respondent actually permitted, in the briefs filed in the District Court, a comma to creep between the word “Cacique” and the word “June”.* This addition to the contract, which would be very helpful to respondent, is not attempted in the “Brief for Appellees” in this court; but respondent produces the same effect by the simpler device of detaching the words “June loading” from their context, claiming that “appellant’s argument is directed to a discussion of the meaning of the contract words ‘June loading,’” and that “proctor for appellant advances the theory that ‘June loading’, as used in this contract, means loading at some time other than June” (Brief, p. 47).

We protest against these imputations. It would be a foolish waste of time to advocate such a theory before this court. We have discussed the meaning of the concrete words of the contract: “*Shipment: Per American S. S. Cacique June loading*” and not that of the abstract words “June loading.”

In passing we might say (what is quite obvious) that even if respondent’s contention were accepted, viz., that “W. R. Grace & Company undertook to move respondent’s cargo in June” (Brief, p. 47) this would not carry respondent far enough

*The clause is correctly printed on page 47 of the Apostles; but on page 93, by an error of the printer, the comma is inserted in the clause. It is important to note that the original contract contains no such comma.

to cancel the contract on account of libellant's failure to move the cargo in June, but would be merely instrumental in *giving respondent the right to claim damages (if it sustained any) by reason of such failure.*

Ignoring the rest of the clause from which the two words "June loading" are snatched, respondent devotes his whole argument to an endeavor to show what these two words mean in an abstract sense. The whole of this argument misses the point, and all abstract discussions of what a "June loading", in general, might mean, or what "the words June loading, singly and collectively" (Brief, p. 48), might mean, are immaterial. The question is, what did the words "*Cacique June loading*" mean, in this particular case, if we put ourselves in the position of the parties who signed the contract.

We have shown in our opening brief:

First. There is a practical presumption of law against such a construction of the words as would make them a condition precedent.

Second. That, without looking out of the four corners of the contract, it is apparent that the parties did not intend to fix an exact day or month for the shipping of the cargo; for (a) The express provisions are: that respondent *would be advised* later "when vessel is closer at hand", and that the time of *delivery* of the cargo "alongside steamer at San Francisco" was not to be definite, but should depend upon the readiness of the vessel to receive it.

(b) The *absence* of a cancelling clause (the usual method of making the arrival of the ship by a particular time a condition precedent to furnishing a cargo) has the effect of an *implied* provision that the arrival of the Cacique at any particular time should *not* be a condition precedent to furnishing a cargo.

Third. The circumstances surrounding the making of the contract, and also the practical construction of the parties, after the contract was made, show clearly and distinctly: (a) that the probable and expected loading of the ship was in June; and (b) that a loading in June was not contemplated as a condition precedent which should entitle respondent to cancel the contract.

While the words "June loading," in an abstract sense, "are in themselves clear and explicit" (Brief, p. 50), the construction of the words "Cacique June loading" requires the court to look out of the four corners of the contract. Counsel says that the words "June loading" mean "June sailing" (Brief, p. 51). It does not seem necessary to answer such a contention in this court.

In *Gray v. Moore*, 37 F. 266 (Brief, pages 51, 52), the ship's agent told defendants who had contracted to furnish freight to the ship, that the ship was leaving Genoa "in a few days," after October 25th, on which basis it was figured that she would arrive at the loading port "about November 20th." In fact *she did not sail in a few days*, but nearly four

weeks later, and the court found that the time of the vessel's arrival was based "*upon untrue representations*, which representations amounted to warranties on the part of the ship and her agents" (p. 268). Libelant was, of course, not allowed to recover against the defendant who had entered into the contract on the faith of the untrue representations. The instant case stands on a different basis; for it is not denied that, at the time of the making of the contract, the expected date of loading of the Cacique was figured out by libelant (as well as it could be done so far ahead) upon data which were *true* and not, as was done in the Gray case, upon data which the court found untrue.

Davison v. Von Lingen, 113 U. S. 40, is cited for the same purpose (Brief, p. 53), and we make the same obvious distinction. There was, in that case also, a warranty by the shipowner of the existence of a *present fact* (viz., that the ship was, at the making of the contract, in a particular situation). The existence of the alleged fact was not true, however, for she was in fact in a different situation.

These cases would only be relevant to the present discussion if libelant had misrepresented facts to respondent when the contract was made in February.

In *Norrington v. Wright*, 115 U. S. 188 (Brief, p. 54), "the plaintiff, instead of shipping about 1,000 tons in February and about 1,000 tons in March, as stipulated in the contract, shipped only 400 tons in February and 885 tons in March," and the Supreme Court held that "his failure to fulfill

the contract on his part * * * justified the defendants in rescinding the whole contract."

Respondent cited the three preceding cases not with any expectation that they could throw any light on the construction of the contract in the instant case. The whole argument begs the question; for it assumes what respondent is trying to prove, viz, that the parties to the instant contract agreed upon a cancelling date. But the whole contract implies and expresses the exact opposite, and respondent is enabled to make its assumption plausible only by picking the words "June loading" from their context. The real question, however, remains unanswered: What did these parties understand by a "shipment per American S. S. Cacique June loading"?

Our contention, that this contract provides *prima facie* that libelant should later advise respondent "more definitely as to exact loading late" (*day and month*), does not, as is claimed (Brief, p. 54), do violence to the contract as written, by practically expunging the two words "June loading", unless these words are wrenched from their context and construed as "guaranteed June loading." But this would do violence to the well-known canons of interpretation relative to conditions precedent. All provisions of the contract, and all canons of equitable construction, are preserved by construing the words "Cacique June loading" as meaning "Cacique expected June loading" rather than "Cacique guaranteed June loading."

There may be “nothing doubtful about the term June loading” (Brief, p. 55); but the court is certainly compelled to look into the circumstances to determine what the parties meant by “Cacique June loading.”

On page 56 of the Brief respondent says:

“They admit, though with some reluctance, that Mr. Davis was assured that the cargo would be loaded some time in June (122, 123).”

The reference is to the testimony of Harvey E. Moore, traffic manager for libelant. What he testifies is this, in substance:

He told Mr. Davis that she (the Cacique) would be due in San Francisco for March loading for Vladivostok “and that *given a favorable voyage her probable date for returning for loading at San Francisco for these automobiles would be some time in June.*” Mr. Davis did not impress upon him that June shipment from San Francisco was necessary; they had been trying very hard to find space for this particular lot of freight, and they would very much appreciate anything which could be done by libelant to move it from San Francisco *within a reasonable time after it arrived here.* He did not tell Mr. Davis that the Cacique was certain to arrive in San Francisco during the month of June, *or at any particular time.* He told Mr. Davis at that time, “*it would be impossible at any time, with the vessel’s commitments ahead of her, to guarantee that she would arrive here in June.*” (122, 123, 124)

This also disposes of the statement that “libelant’s officers knew that respondent wanted cargo space for May or June sailing” (Brief, p. 56), and

that "they wanted Davis to understand that he was getting 'June sailing', which was what he sought, or, at any rate, 'June loading' " (Brief, pages 56, 57). The statement that the information transmitted by Davis to respondent, viz., that Grace & Company could take the 6200 tons "for early June", was "undoubtedly obtained from libellant" (Brief, p. 57) is not supported by the evidence. Certain it is that Mr. Davis clearly understood, and so admitted, that a steamer of the tramp class, in the position of the Cacique, could not possibly, so long ahead, fix any exact time for a prospective shipment contemplated four or five months later (333, 334, 356, 357). It was entirely "reasonable for Grace & Company to draw the contract in its present form, if their undertaking was merely to load the cargo upon the return of the steamer Cacique from her voyage to Oriental parts" (Brief, p. 57), provided that it was reasonable for them to assume that they were dealing with a respectable contractant not expected to hunt for flimsy excuses for breaking its contract the moment the developments of the future would make a breach profitable. What was said in this case, is exactly what two fair business men would say, after having figured that the two probable loadings of the Cacique, after date, were expected to be, the first a March loading, the second a June loading; they would say that the agreed shipment should be per Cacique June loading, meaning thereby, not by the next loading after date, but by the second San Francisco loading after date. Respondent's argument

that such a form of expression is not reasonable would have much force if, after the experience which libelant has now had with the shifty Eastern rhetorician who wrote the letters of June 1st and June 14th, libelant should again rely upon the business language ordinarily prevalent among merchants presumably capable of standing by their contract, whether it “pays” or not.

Respondent argues that there is nothing ambiguous in the contract, and in the same breath admits that even now it has not made up its complicated mind as to whether the contract called for a “June sailing” or a “June loading.”

On page 58 of the Brief respondent refers to “the testimony of Mr. Davis that he had asked Grace & Company for space for June sailing (326, 324, 328).” Of course it is thereby desired to create the inference that Davis had asked for a *guaranteed* June sailing. But his testimony in this respect shows just the opposite. He had secured space for previous months, which show that he did not intend to contract for space *earlier than June*.

“We were looking over the map, and it seemed that the Cacique was about the only boat that we could *figure on* which would arrive for June sailing. As I recall, she was then on her way from the East Coast to this port, and then for Vladivostok, and her round trip would bring her back into this port ABOUT JUNE.” (327)

If steamship men “figure” out that a vessel will arrive in port “about June,” the probability in their minds is that she will not be *earlier* than June, but

they leave a margin in their minds for a possible later arrival. This evidently satisfied Mr. Davis' requirements.

"I was told that it would sail *somewhere around the 24th of June*, or around the 14th or the 24th, I should say; but I don't remember exactly that conversation." (328)

Would this have satisfied Mr. Davis, if he had required a positive *guaranteed* June sailing? The evidence shows that Mr. Davis knew that no steamshipman would be in a position to guarantee the date of arrival of a steamer in the situation of the Cacique four or five months ahead (333, 334, 357).

The correspondence between respondent and its San Francisco agent, *after* the contract was made (Brief, p. 61), does not, in itself, determine the meaning of the words of the contract, but it shows what respondent, and the agent, understood by "Shipment per Cacique June loading."

If there is any doubt as to the true meaning of the contract, the practical construction put by respondent upon it, concurring with that of libellant, is entitled to great weight.

Railroad Co. v. Trimble, 77 U. S. 367.

The Supreme Court has said twice:

"There is no surer way to find out what parties meant than to see what they have done."

Insurance Company v. Dutcher, 95 U. S. 269;

Lowery v. Hawaii, 206 U. S. 222.

In the latter case the Supreme Court added:

“So obvious and potent a principle hardly needs the repetition it has received.”

That a real doubt exists as to the true meaning of the contract is admitted by respondent's admission that even now it does not know whether the contract called for a June loading or a June sailing; but apart from this fact the question is, whether the contract requires a loading in June as a condition precedent, entitling the respondent to a cancellation in case of inability to load in June; or whether it means a loading in June as a warranty entitling respondent to damages, if it suffered any, by a loading in July; or whether it means, as libellant contends, a loading upon the second arrival of the *Cacique* in San Francisco, the exact date of which would be agreed upon later, but which, on February 25, 1916, was expected to be in June, as near as the parties could then figure out her probable arrival after her intervening voyages.

Counsel is in conflict with the record when he states (Brief, p. 61) “that both Davis and respondent treated the contract as one for June sailing.” He is also mistaken in claiming “that shipments from respondent's factory were arranged by months.” The correspondence shows the opposite: The words (used by respondent) “*say for late June early July sailing*” (269); and “*would like this for June-July sailing*” (270) and similar expressions in the correspondence (“about July 1”—314) show that the fixing of any precise time limit for loading

was not respondent's custom nor contemplated by respondent in this instance.

Respondent argues that the reference, by respondent's agent, to "S. S. Cacique, LOADING AT SAN FRANCISCO ABOUT JULY 1ST" (313, 314), *is not inconsistent with "June loading"* (Brief, p. 62). We heartily agree with this argument; it is exactly what we are contending. The "June loading" in this contract, the "Cacique June loading," is satisfied by a "loading at San Francisco *about July 1st.*" Here we have, after a long struggle which has necessitated all this argument on our part, a definite and conclusive admission that a loading of the Cacique "*about July 1st*" is a fulfillment of the contract within the meaning of the parties; that a loading in June is *not* a condition precedent, but that a loading in July is within its terms.

On page 62 respondent argues that:

"the letter of May 31st referring to the willingness of the Union Steamship Company to release any of respondent's freight remaining after July 1st, for the purpose of enabling respondent to fill its undertakings under the present contract, are the statements of the Union Steamship Company, not of respondent."

This is not so. They are the statements of respondent's agent, made to respondent, suggesting the securing of *freight available after July 1st* as a *proper fulfillment of respondent's undertakings*. The suggestion came from the man who signed the contract and was made to his principal. What better evidence could there be to show that this party

to the contract construed the contract to mean that a providing of Cacique freight, by respondent, after July 1st, was a proper compliance with the terms of the contract?

That respondent had the same understanding is shown by its letter to the San Francisco agent referring to the invoices and bills of lading covering the Australian shipments for June and July. In this letter respondent states that the *June* shipments are expected to go forward on the Union Steamship Company's steamers (Coolgardie, June 3d, and Waimarino, June 30th), *whereas the July* shipment was expected by respondent ("we expect") to go forward in the Cacique ("*Cacique July 12th*") (309).

Exactly in line with this expectation, by respondent, is the "hope" expressed by Mr. Davis that the vessel "will even be as late as the tenth of July." They both show that respondent *did not want a June loading*; for it would have involved a heavy demurrage bill. Counsel argues that Mr. Davis' hope was "that some solution of its (respondent's) difficulties might appear "if the steamer did not arrive in time to make 'June loading' " (Brief, p. 63). If this had been all that occupied Mr. Davis' and respondent's mind, would it not have been sufficient that the Cacique would be as late as the first of July? Would Mr. Davis have expressed first, "the hope that she will *even* be as late as the tenth of July," and, second, the hope born from the first one, viz., the "hope that you will be able to fill the space with your own cars"? (308, 309).

The court will note that, while an explanation of Mr. Davis' hope of June 13th is attempted in the Brief for Appellees, respondent has not had the hardihood to offer an explanation of respondent's expectation of June 3rd that the cargo would go forward on the Cacique on July 12th.

The evidence shows that Mr. Davis never had it in his mind, on February 25, 1916, that the contract which he was making should be automatically cancelled in case the Cacique should not be loaded by June 30th. At that time cargo space was so precious that respondent was willing to pay for space as high as \$52.50 per ton (265, 267); respondent, therefore, knew that it was *then* making an advantageous bargain. Vessel tonnage was very scarce, on account of the European War (118), and respondent was in need of a vast amount of tonnage. It would not have been the interest of respondent, under these circumstances, to make a contract providing that respondent should automatically lose this ship if she should happen to arrive on the first of July instead of the last of June. And it would have been incredible folly for libelant to tie up its steamer in a contract, for less than the going rate (117), with a provision that she would find 6200 tons of cargo ready for her voyage, if she arrived on the last day of June, but that the contract should be "automatically cancelled" (299), and she would find no cargo at all, if she arrived on the first day of July. A little reflection will show how fatal the effect of such a contract would have been even to respondent's interests.

Supposing it had really wanted space for June only and insisted that an arrival in July should cancel the contract automatically, this would have invited libellant to make a more favorable contract with another party after February 25th and, after that was done successfully, to delay the steamer one day, to July 1st, so as to “cancel the contract automatically.” Respondent is too shrewd a merchant to allow the presumption that it would have been capable of making such a contract as it now, in the light of the after events, pretends to have made. The court will assume that the parties to this action were both possessed of normal business ability, and on such an assumption the construction for which respondent contends becomes impossible.

That this contract contains no condition precedent, nor warranty of the time of loading, follows first, from the natural construction of the contract as a whole; second, from the evidence of the circumstances surrounding the parties when they made it; and third, for the practical construction which the respondent placed upon it subsequent to its making, as appears from the correspondence in evidence. All of these facts, viz., the natural construction of the language, the circumstances at the time, and the acts of respondent subsequent to the time of the making of the contract, point to the same conclusion: that respondent’s expedient of snatching two words “June loading” from their context can be of no avail in establishing a defense on the merits.

We contend that even a strictly literal construction of the *whole* contract favors the meaning for which libelant contends, viz., that the time of the loading was a condition precedent only in the sense that the Cacique was to load respondent's cargo on her *second* arrival at San Francisco after the date of the contract.

Even if that were not so and the words "June loading" were detached from the context, this court would follow the principles laid down by the Supreme Court in *Reed v. Insurance Company*, *supra*, to the effect that

"a rigid adherence to the letter often leads to erroneous results, and misinterprets the meaning of the parties" (95 U. S. 30),

and would find that "all the circumstances of the case" make it manifest that the parties in this case used the words in question in the sense for which we contend.

"Although a written agreement cannot be varied (by addition or subtraction) by proof of the circumstances out of which it grew and which surrounded its adoption, yet such circumstances are constantly resorted to for the purpose of ascertaining the subject-matter and the standpoint of the parties in relation thereto. Without some knowledge derived from such evidence, it would be impossible to comprehend the meaning of an instrument, or the effect to be given to the words of which it is composed. This preliminary knowledge is as indispensable as that of the language in which the instrument is written." (95 U. S. 30.)

The Supreme Court, in the case cited, adopted the language from *Taylor, Evid.*, sec. 1085:

“It may and, indeed, it often does, happen that, in consequence of the surrounding circumstances being proved in evidence, the courts give to the instrument, thus relatively considered, an interpretation very different from what it would have received, had it been considered in the abstract. But this is only just and proper; since the effect of the evidence is not to vary the language employed, but merely to explain the sense in which the writer understood it.” (95 U. S. 31.)

In the instant case

“no violence is done to the language used, to give it the sense which all the circumstances of the case indicate that it must have had in the minds of the parties.” (95 U. S. 32.)

FIFTH: REPLY TO APPELLEES' BRIEF (pages 64-69,

Respondent's argument is predicated upon the assumption that respondent's performance of the contract was not due until the Cacique was ready to load at her loading wharf. But, as we have shown, its performance of the contract was due long before and respondent, realizing this, had commenced performance long before by sending some of the Cacique cargo westward. Respondent had breached its contract on the day when the libel was filed in numerous ways, the principal and sufficient one being its failure and definite refusal to supply 6200 tons of cargo for the impending Cacique voyage. In one sense respondent's breach was anticipatory, be-

cause it had not yet performed *all* the acts constituting performance on its part; in another sense it was a breach during performance, performance having been begun by respondent in May. Libelant's action was not commenced before performance was due on the part of respondent, but on the contrary, was commenced *after* respondent had breached its duty, by failure and refusal, to provide 6200 tons of cargo.

We believe respondent to be mistaken in claiming that, under the "*Indrapura*" doctrine (Brief, p. 65) "libelant would have had no right to load respondent's cargo and take the vessel into dry dock." We suggest that libelant had the right to so load the cargo, subject to respondent's right to damages in the event that any injury had occurred to the cargo during the dry docking.

Respondent emphasizes its contention that, when the libel was filed, "time for *loading* had not arrived" (Brief, p. 65). If that be granted, it does not follow that respondent's time for performing had not arrived. It *had* arrived long ago, and respondent recognized this by beginning performance in May; it had not only arrived, but respondent, after commencing performance, changed its mind and failed and refused to continue.

Respondent also predicates an argument upon the assumption of "*exact loading dates.*" The answer is, that there are no exact loading dates under this contract. On the contrary, respondent was given (within reasonable limits) the right to buy the

time of the vessel, at so much per day, for the purpose of loading at *its* convenience. Even if libelant did ask for a loading on June 29th, this did not excuse respondent's failure and refusal on June 27th, to carry out the 6200 tons contract.

Respondent's reference to a "stipulation" made, at the trial, by counsel for libelant is obviously overdrawn (Brief, p. 66). There was no admission of *fact* involved in the colloquy which took place between the court and libelant's counsel, at the closing argument of the case, and which is referred to in Brief for Appellant, page 71; it could, therefore, not be properly characterized as "the most solemn form of evidence that can be produced." In a trial *de novo* it is proper that counsel may, if he so desires, claim the benefit of legal principles, or a theory, which he may have waived at the first trial. It is not, however, admitted that the benefit of this principle is *required* for the purpose of a proper decision of this case. We do not ask for any "withdrawal of evidence" (Brief, p. 67). All that we contend is that the libel, even if it were brought a few hours too soon, should not be dismissed for that reason alone.

"A libel will not be dismissed merely because it was brought too soon, if substantial justice can be done, and ought to be done, under it."

The Hyperion's Cargo, Fed. Cas. No. 6,987.

"It would be in the power of the court, by giving costs or otherwise, to give to the claimant a complete indemnity for all the loss or inconvenience he can sustain by the premature

commencement of the suit. And it would not have been necessary to dismiss the libel. * * * *It is not the practice of courts of admiralty to favor formal or technical objections, to the sacrifice of substantial justice.*

The Salem's Cargo, Fed. Cas. No. 12,248.

“In courts proceeding according to the course of the civil law *there is less reason for rigor in the rule that the right of action must be complete when the suit is commenced than in common law courts.* * * * If the cause of action is matured when the answer comes in, or even at the time of trial, there is no necessity for ordering the suit to be brought *de novo.* * * *”

The Isaac Newton, Fed. Cas. No. 7,089.

To the same effect is

Furniss v. The Magoon, Fed. Cas. No. 5,163.

From these authorities it follows that, even if it were true that libelant “had no case at all when the libel was filed” (which is denied), this would not be a cause for dismissing the libel.

We submit that, on the merits of this case, and in the interest of justice, the decree of the District Court should be reversed.

Dated, San Francisco,
November 10, 1921.

ANDROS & HENGSTLER,
LOUIS T. HENGSTLER,
F. W. DORR,
Proctors for Appellant.

No. 3721

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

W. R. GRACE & COMPANY (a corporation),
Appellant,

VS.

FORD MOTOR COMPANY, OF CANADA, LTD.
(a corporation) and ROBERT NETTLEFOLD,
Appellees.

Upon Appeal from the Southern Division of the United States
District Court for the Northern District of California,
First Division.

BRIEF FOR APPELLEES IN REPLY TO
REPLY BRIEF FOR APPELLANT.

W. F. WILLIAMSON,
Proctor for Appellees.

FILED

NOV 30 1921

F. D. MONCKTON,
CLERK

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BRIEF FOR APPELLEES IN REPLY TO REPLY BRIEF FOR APPELLANT.

In our former brief we presented a detailed statement of the case. We felt called upon to do so because, though Appellant's Brief quoted extensively from the correspondence, although not connectedly or always exactly it was wholly inadequate to give the Court an understanding of the case involved on this appeal. Appellant's oral argument was devoted entirely to comment upon some of the

correspondence, but in its Reply Brief, appellant has developed arguments differing somewhat from those advanced in the trial Court or in the brief originally filed on appellant's behalf. We shall, therefore, avail ourselves of the permission of the Court to reply as briefly as possible to the new matter presented in the Reply Brief for Appellant. Before doing so, we shall answer the criticisms upon our statement of the case. Happily, these criticisms are few in number and might be considered unimportant except that proctor for respondent in stating the case, was mindful of his duty to the Court to state the facts with exact fairness, and is ready to sustain such statements whenever their correctness is challenged. In this brief we shall endeavor to collect and consider, under appropriate headings, all statements and arguments of proctor referring to the several subjects discussed so as to avoid needless repetition. Our page references, unless otherwise indicated, are to the pages of the Apostles on Appeal.

1. Appellant's first objection is that the statement on page 4 of Respondent's Brief, that "on May 1st, 1916, respondent wired Ford Motor Company at San Francisco, that 5658 tons would be sent forward for shipment under this contract" is not supported by the record. We cite page 283 of the Apostles on Appeal from which we quote an acknowledgment of the wire referred to as follows:

"On May 1st, we received your wire in which you advised there were 1316 cars in all and

based on the measurement of approximately 4.3 each would make a total of 5658 tons. This leaves only a difference of 542 tons for which we have signed contract with Henry W. Peabody & Company.”

These figures total 6200 tons, the full contract requirement. The fact that 542 tons only were contracted for with Peabody & Company, and neither more nor less, indicates that at the date of the Peabody contract—May 12th—respondent believed that it had available, or had procured, cargo for the entire 6200 tons space. This circumstance has an important bearing also on the statement, or the insinuation, of appellant, that respondent had, by reason of some more favorable freighting agreements, made it impossible to perform under this contract. When the 1316 cars referred to in the telegram of May 1st, were packed and shipped it was found that the tonnage, measured and weighed in the ratio required by the contract, was somewhat less than had been estimated by respondent’s San Francisco agent. It, therefore, developed that the 542 tons of freight procured from Peabody & Company did not satisfy respondent’s cargo requirements and, therefore, respondent’s statement that this shortage was discovered after May 1st, is entirely correct.

2. Answer to the charge that respondent made other contracts for a portion of its tonnage in bad faith or in violation of its contract.

Libelant’s Reply Brief contains many references to this charge. It is generally claimed that the

making of such a contract had rendered it impossible for respondent to perform the contract sued upon. In some instances it is argued that this amounted to an actual breach of the contract. In others, that it constituted an anticipatory breach. Finally, it is urged that it was both an actual and an anticipatory breach committed by respondent in self-interest and with utter indifference to its contract obligations.

As we shall show, the contract complained of was made within a month of the execution of the agreement sued upon, and before respondent had received that agreement or was fully advised of its terms. A contract so made months before performance of the contract here involved would, by any possibility, become due or before performance was asked, could not in the nature of things be an anticipatory breach inasmuch as respondent when it made the new contract did not know that the agreement sued upon in this action was effective (316, 276). There was no notice of breach or renunciation. Furthermore the making of such a contract did not render respondent unable to perform the agreement sued upon, though without such contract the cargo therein contracted for would have been sent forward for movement on the Cacique or other vessels moving out of San Francisco. There was a known basis, as the facts cited by libelant shows, on which the equivalent or a greater tonnage was obtainable from the Union Steamship Company, and there was always the possibility, by arrangements such as that

made with Peabody & Co., of supplying any shortage in cargo when delivery thereof should become due.

There remains only the charge or insinuation that respondent in disregard of its agreement sold some of its freight to another carrier because of a more advantageous rate. If this fact were true it would be material only if respondent thereby breached its agreement, which we have shown was not the case. Respondent was not prohibited by reason of the making of the contract sued upon from contracting for earlier movement of other cargo. There was no necessary relation between the two transactions and respondent would be liable as for a breach of the present contract, whether or not it had made another contract.

However immaterial in effect, we cannot allow to pass unanswered the charge that respondent sold some of its cargo to another carrier because of a more favorable rate, nor the intimation that respondent was indifferent to its contract obligations. Appellant's statement that "respondent yielded to the temptation of giving a part of the cargo to the cheaper carrier, etc.," is answered by the letters to which appellant refers. This only goes to show the evil of quoting detached sentences from letters without references to context or subject-matter. The matter first quoted has no reference whatever to this subject. It refers only to the Peabody contract of May 12th. The passage next quoted is preceded in the record by the following, which libelant

did not quote: “We are sorry we did not know the existence of this contract. It has never been received at this office. Had we had it we would never have made certain space engagements”, etc. (276, 316). Upon the trial it clearly appeared from the evidence introduced by libelant, that the contract in question was lost in the mails, with the result that until a copy thereof was forwarded about April 3rd, respondent had no definite knowledge as to all of its details, or that the contract was firm (276, 288). Respondent’s letter of May 25th to its San Francisco agent in this connection, states:

“For a considerable length of time we did not know what if any arrangements you had made with the owners of the ‘Cacique’. During this time we entered into negotiations for the forwarding of cargoes on the steamships Whakatane and Pakeha. We would not have accepted these arrangements had we known your arrangements were completed.

You will further recollect that the contract you signed did not carry through to us and it was not until we received a copy of this contract that we really knew the details of this transaction in their entirety.” (287)

It is thus apparent that the contract so unfavorably and unfairly commented upon by appellant, was made sometime between February 25th, the date of libelant’s contract, and March 28th, which was before the copy of the contract reached respondent’s office. In any event, as explained by respondent to its agent, the contract was made in ignorance of the fact that the arrangement with appellant

had been completed. This evidence was introduced by libelant. It is a sufficient answer to appellant's present claim, that respondent acted unfairly or from self-interest or with indifference to its contract obligations, and proctor for appellant should not have permitted his zeal for his client's cause to induce a statement or insinuation in conflict with facts so clearly established.

3. The attempted borrowing of 1500 tons from Union Steamship Company—the facts and significance of this circumstance.

The facts in this connection were correctly stated on pp. 4 and 5 of Brief for Appellees and are not questioned. Appellant in its Reply Brief, however, has attempted to draw some inferences therefrom, favorable to libelant's present contentions.

That respondent, on and after May 25th, 1916, intended to and was endeavoring to supply the full 6200 tons of freight on the assumption that the same would be loaded and shipped in June, is made very clear by respondent's letter of May 25th, addressed to its San Francisco agent, in which, after clearing up the confusion in the correspondence due to the loss of the contract, respondent directs its agent to borrow 1500 tons from the cargo, previously forwarded for the Union Steamship Company's steamers, which it was thought could be readily done inasmuch as several vessels of the latter company had been commandeered, and it appeared that there might be some delay on the Union Steamship Com-

pany's part in moving its freight. Respondent's agent in San Francisco was also directed in the same letter to sublet any short space (288, 289).

Appellant endeavors to draw from the correspondence touching such proposed transfer an inference of dishonesty on respondent's part. The Illinois Central Railroad Company had been endeavoring to arrange this transfer, and on May 31st wired respondent that the Union Steamship Company was agreeable to the transfer of the 1500 tons cargo, and respondent accordingly forwarded a memorandum agreement to protect the Union Steamship Company in that behalf (Apostles, pp. 293, 294). On the evening of the same day a night letter was sent to respondent from San Francisco, advising respondent that the Union Steamship Company expected to move all cars then in San Francisco by the end of June, but agreed to give to respondent for the Grace contract any cars remaining unshipped after July 1st, upon condition that respondent guaranteed an equal quantity of freight during later months (296). By a letter dated June 1st, although as indicated by the general course of correspondence this letter was probably dictated on the previous day, respondent advised libellant, among other things, that an arrangement had been effected for the transfer to libellant of 1500 tons then on the coast originally intended for the Union Steamship Company steamers (Apostles, p. 49; also Appellees' Brief, p. 5). Libellant quotes the statement last mentioned and, disregarding the rest of the correspond-

ence and attending circumstances, charges that the statement was untrue. Such was not the fact, however, for in view of the telegram received from the Illinois Central Railroad Company, respondent was justified in assuming that the proposed transfer of 1500 tons for sailing in June upon the Cacique had been agreed upon by the Union Steamship Company. Their faith in that understanding is shown by the fact that they drafted and forwarded a contract protecting the Union Steamship Company in that behalf (296). The letter to libelant must have been written with that understanding and prior to the receipt of contrary advices as to the Union Steamship Company's attitude in the form of a day letter from that company dated June 1st. Respondent was certainly entitled, in view of the telegram from the Illinois Central Railroad Company, to believe that the Union Steamship Company had consented to the transfer, which respondent in turn promptly agreed to. By such transfer the entire short tonnage for the Steamer Cacique would have been covered. On the other hand, this plan failed, and the later advices as to the position of the Union Steamship Company were to control. Nevertheless respondent was privileged to take any tonnage originally forwarded for the Union steamers and which was left at San Francisco on July 1st, for carriage on the Steamer Cacique. The Ford Company did not avail itself of this privilege for the reason as stated in its letter of June 1st to libelant that it was understood and expected, at least by respondent, that the

Steamer Cacique would load and sail in June (49). It is worthy of note, as stated in our former brief (page 6), that libelant in replying to this letter did not indicate that the Cacique would not sail until July, but expressly advised respondent that she would load on June 27th, and requested delivery of cargo alongside on that day "for loading as fast as vessel can receive" (352). It is not perceived wherein an offer on the part of the Union Steamship Company to surrender any of its cargo left in San Francisco after July 1st, so that respondent might, if it so desired, load it on the S. S. Cacique, indicates that respondent understood or agreed that the Cacique was not to load in June. We consider the failure of respondent to close on that offer shows very clearly that respondent considered its contract as one to be accomplished in June, otherwise it would have accepted the offer of the Union Steamship Company.

The statements to which libelant takes exception (Reply Brief, 5) are truthful in themselves and fully supported by the correspondence introduced by libelant. In the telegram addressed to respondent February 24th, inviting the present contract, respondent's agent said, "If you can take 6200 tons for early June can close with Grace & Company". Respondent replied on February 25th, "Accept Grace offer 6200 tons confirm advising names and dates of sailing". On February 27th respondent's agent answered, "Have signed with Grace American Steamer Cacique about June 24th". On the follow-

ing day, March 1st, respondent's agent wrote confirming the telegram, and said, "The boat is scheduled to sail about the 14th of June" (Apostles, pages 265-268; Appellees' Brief, p. 3). As stated by respondent to its San Francisco agent in a letter of May 31st, respondent's understanding was that the Cacique would sail on or about the 14th of June, until a few days prior to the date of that letter, at which time respondent learned that the sailing of the vessel was deferred until July. It was because of the recently obtained information as to this deferred sailing that respondent wrote the letter of June 1st to libelant, in which it was claimed that the contract called for June loading or June sailing, and that accordingly, libelant itself was not in a position to comply with its contract. For which reason respondent in said letter reserved its rights to so claim if respondent should fail in its plans to provide the full tonnage contracted for. Those plans were explained in the previous paragraph of the same letter to include 4075 tons previously shipped by respondent, the 1500 tons to be borrowed from the Union Steamship Company, and 542 tons procured from Peabody & Company. Therefore, respondent's letter of June 1st, which was incorporated by reference in the letter of June 14th, and a part of the so-called repudiation of the contract, expressly declared respondent's intention and expectation to supply the tonnage contracted for. Libelant's contention that respondent's plans for supplying the tonnage were predicated upon the

fact that the Cacique would not sail until after July, is merely an unwarranted inference on libelant's part. In passing, we might say that if libelant's inference were correct, it only serves to show that had libelant not filed its suit prematurely, and in advance of time when the vessel could load and, therefore, before performance was due on respondent's part, respondent might have had available the tonnage otherwise designed for the Union Steamship Company steamers.

4. Respondent's letter of June 14th.

It is next claimed that our statement "does not present a fair reflection of the effect" of respondent's letter of June 14th. Our statement as to this letter is to be found at page 6 of Brief for Appellees, and we can see no reason to apologize therefor in any way. Libelant says the letter was a flat repudiation. It could not be so understood. It was a reply to libelant's letter of June 6th (134), in which, referring to respondent's letter of June 1st (previously mentioned), libelant said, "We are glad to note that you have now arranged for 6099 tons out of the 6200 allotted to you and we hope you will be able to supply the remaining tonnage". By referring back to the letter of June 1st it is clear that respondent's argument as to the binding force of the contract was based on the fact that respondent had contracted for "*June loading*", which in the parlance must necessarily mean "*June shipping*"; and that a sailing in July voided the contract, etc.

It is true, as libelant says, that respondent stated that it had forwarded 4075 tons and would not forward more. At the same time libelant's letter, to which this was an answer, recited the understanding previously conveyed in respondent's letter of June 1st, which was the subject of interpretation in the letter of June 14th, that, in addition to the 4075 ton cargo so specially forwarded for the Cacique, respondent had arranged to forward 1500 tons from the Union Steamship Company, and had procured 524 (in fact 572) tons from Peabody & Co. The two latter shipments, amounting to 2072 tons, were already in San Francisco and did not require forwarding. Nor did respondent offer a new contract. Libelant in its letter of May 25th (102), to which the letter of June 1st was an answer, declared its purpose to hold such tonnage as respondent furnished, "for dead freight". As stated in our former brief, the contract did not authorize libelant so to do. Therefore, respondent's contention that this right, or alleged right, be not insisted upon, was not a threat, or a breach of the contract, but was merely a correct asserting of its rights according to the contract.

There could be no "implied declaration", as libelant states, "that respondent had already breached the contract", because, as previously stated, respondent's letter of June 1st, which was the essence of this correspondence, was written by respondent upon the assumption, and so stated, that 6099 tons cargo had been provided as a performance under the

contract. Moreover, an anticipatory breach *cannot be implied*. It must be distinct, unequivocal and absolute (*Dingley & Oler*, 117 U. S. 490; *6 Ruling Case Law*, 1025).

This letter should rightly be considered in the discussion of the question of anticipatory breach, but, since proctor for libelant has interpreted it and drawn his inference as to its effect at various points in his brief and without any necessary connection with the subject of anticipatory breach, we have dealt with it here in reply to its first appearance in Libelant's Brief.

5. Libelant's letter of June 22nd.

This letter was quoted at page 7 of Brief for Appellees with the statement that by such letter libelant fixed the time during which respondent should deliver its freight for loading. Libelant's Reply Brief admits that the demand contained in this letter was unwarranted, because the contract required respondent to deliver its freight only "as fast as the vessel could load". In this connection libelant claims that it was under no obligation to load the vessel in June, and, at page 13 of its brief, also admits that respondent was not required to deliver its cargo until after July 1st. Libelant further states that the notice was merely given out of deference to what is termed an erroneous contention on the part of respondent that the contract required June loading. On page 13 of its Reply Brief, libelant also asserts that the letter under

consideration “does not state or intimate that the Cacique would be ready to load on June 27th”. The libel alleges (Paragraph IV, Apostles on Appeal, p. 11) that on June 5th libelant advised respondent “as to the loading date aforesaid, said Steamship Cacique would be ready for loading said 6200 tons of automobiles and parts in packages as per said contract of February 25th, 1916, on the 27th day of June, 1916”. This letter, which was actually dated June 6th (352), also directed respondent to deliver its freight “for loading as fast as ship can receive”. The letter of June 22nd by its terms supplemented the letter of June 6th, and after declaring that the vessel would be ready to load on June 27th, required respondent to commence delivering its freight on June 27th and to complete the same on June 29th (142). This disposes of libelant’s claim that no loading date was mentioned. The allegation of the libel, and indeed the letters themselves, indicated that these letters were written to definitely fix a time for performance on respondent’s part, which was necessary, inasmuch as the contract required libelant to specify a loading date in June when the vessel was nearer this port. Libelant’s present admission that the demand for deliveries was premature and unwarranted, necessarily carries with it the implication that the vessel was not ready to load on June 27th or the two following days because if she was ready to load, the notice was not premature or unwarranted. And this admission on the part of libelant would dispose also

of the argument, advanced in the later pages of its brief, that libelant was ready or able to perform its contract at the time it filed its libel on June 27th (450). If we accept the further admissions of libelant, above noted, that respondent could have delivered its cargo after July 1st, and that libelant was not required to load the cargo in June, it is clear that performance was not due on the part of either party, irrespective of the notice and of the condition of the steamer at the time the libel was filed, which only goes to sustain the determination of the District Court that the action was filed prematurely and in advance of a breach. Moreover, if it be a fact, as asserted in Libelant's Brief, that the letter of June 22nd, demanding delivery by June 29th, was written to meet respondent's construction of the contract, such fact indicates either that libelant shared respondent's understanding that "shipment per American Steamship Cacique June loading" required loading in June or that libelant believed at that date that it would be able to meet its contract obligations, as interpreted by respondent, and load in June. Libelant's manager testified (218) that he intended to try and load a small, though not necessarily a substantial part of the cargo in June, simply to make a pretense of loading (219). Either view is inconsistent with the argument advanced by libelant in the trial Court and in its former brief, that the contract required loading only at some indefinite time after the vessel shall have made a trip to Oriental ports and re-

turned to San Francisco, and with the construction, presently contended for by libelant, that the contract contemplated loading on or after July 1st and not in June.

6. The 1100 packages delivered by respondent on libelant's wharf.

The fact of this delivery and of the correspondence with the Southern Pacific Company was stated at pages 7 and 8 of the Brief for Appellees; and the effect thereof considered at pages 33 to 35 of the same brief. Libelant, without questioning the correctness of our statement, says the delivery was qualified by a notice simultaneously delivered by respondent that these packages were delivered only under a new proposed contract. We are quite sure that proctor for libelant does not mean to say that any notice in the words as stated was actually or simultaneously delivered. He is only giving his version or interpretation of letters elsewhere noted. The argument of libelant, however, contains its own answer. Counsel says libelant did not accept the new contract and refused to receive this freight under any new contract. Yet the 1500 tons were admittedly delivered on the wharf at which the vessel docked and were ready for shipment (Libel pars. IV and VIII). Libelant's manager testified that libelant had received them as freight and held them in possession as freight at the time that the libel was filed, and that they were libeled in rem as freight (230-229-321). It is vain for counsel to

argue, on the other hand, that those packages were not received as performance under the original contract. Reduced to final analysis libelant's argument is that these packages were not received as freight under the new contract, because the new contract alleged to have been tendered was rejected, and that libelant did not receive them under the contract sued upon, because that contract had been repudiated by the new contract which had been tendered though not accepted. Arguments or conclusions must rest upon facts and principles, and not upon seductive fancies.

**ANSWER TO ARGUMENT THAT THERE WAS AN ACTUAL
BREACH BY RESPONDENT.**

The District Court held that there was no actual breach on respondent's part since the vessel was not ready, and could not be made ready, to take on cargo at the time the suit was filed; also that when the libel was filed, neither the time for performance on respondent's part, as fixed by the contract, had not expired, nor the time as fixed by libelant's notice of June 22nd had expired. Replying to libelant's attack upon this decision, respondent showed by the indisputable evidence in the record that at the time the libel was filed the vessel was laden with 7900 tons of inward cargo and was not unloaded before July 8th; that the vessel herself was unseaworthy and would not be permitted to clear at the port of San Francisco until, having been unloaded, she had been placed in drydock and undergone repairs, which was only

accomplished on July 12th; that libelant's manager had not expected to begin to load until June 30th, and admitted that it was impossible for libelant to have loaded any cargo up to June 29th, or, indeed, at any time during June. We also showed that although respondent was only required under the contract to deliver its cargo "as fast as the vessel could load", libelant had, by its letter of June 22nd, demanded that respondent commence to deliver its cargo on June 27th and complete such delivery on June 29th (a demand which in its Reply Brief libelant has admitted was unwarranted on its part). Two days of that specified time had not elapsed when the libel was filed. Upon these facts and well-settled principles of law we submitted that the decision of the District Court was unassailable. Respondent's argument in that behalf is found in pages 15 to 18, inclusive, of Brief for Appellees, and will not be here repeated.

Returning to the discussion of this branch of the case in its Reply Brief, appellant has confused the principles applicable to an actual breach with those pertaining to an anticipatory breach. For example: Libelant's observations upon the letters which were alleged in the libel to constitute the anticipatory breach, should properly be directed to that portion of appellant's argument. If appellant's argument that respondent's letters constituted an anticipatory breach were correct, which we have elsewhere shown is not a fact, whether the breach so claimed to have been tendered was accepted or not, the same letters

could not constitute an actual breach, because the contract could not have been breached and also be still alive. Again, if it were conceded for the purposes of the argument that the portion of the testimony of libelant's manager, quoted at pages 10 and 11 of the Reply Brief, justified an inference on the part of proctor for libelant, that libelant was notified not to touch respondent's cargo or at least the 1100 packages, this was admittedly prior to the time that any portion of that cargo could have been loaded upon the vessel, and at a time when the vessel was unseaworthy or could not be made ready to accept freight. Mr. Carter so admitted. Libelant is not warranted to draw such an inference from the testimony, as will clearly appear from the question and answer next following the matter quoted by libelant from page 229 of the Apostles on Appeal. That question and answer are: "Q. You had not been prevented up to that time? A. No."

For the reasons stated by the District Court and according to elementary principles of law, there could have been no actual breach of the contract on respondent's part at the time the libel was filed. The tests by which to determine whether there was such a breach are fundamental, namely: Was performance due at the time of the alleged breach, and had libelant performed, or was it ready, able and willing to perform its obligations? The Court found that neither of these conditions existed, and we have already shown that at the time the libel was filed and for some weeks thereafter the vessel was

unseaworthy and could not load; that she would require fumigation, which could only be done after the inward cargo was discharged, which was not until July 8th; that she was unable to load any cargo on the 27th or 28th of June, assuming that this cargo could have been loaded while the inward cargo was being unloaded; that the contract required respondent to deliver its cargo for loading only "as fast as ship can load", and furthermore, that the time specified by libelant in its notice of June 22nd had more than two days yet to run. Libelant itself, however, has furnished a perfect defense to the charge of actual breach upon the part of respondent. On page 6 of its Reply Brief, libelant declares that it was under no obligation to load in June, and that a loading in July satisfied the contract. Speaking of respondent's obligations, at page 13 of the same brief, libelant expressly admits that respondent was permitted, and well within its rights, to deliver its cargo after July 1st. If, as libelant admits, respondent was permitted under the contract to deliver its cargo after July 1st, it was obviously not guilty of a breach of contract in failing to deliver the whole cargo on June 27th.

Nevertheless, libelant in its Reply Brief asserts that performance on respondent's part was due on June 27th (the day the vessel arrived), and that libelant was on that day ready, able and willing to perform its contract.

Libelant's first observation is that performance on respondent's part was due on June 27th, to the

extent that respondent should have ready 6200 tons of cargo on that date. In the next sentence, however, libelant declares that by the demurrage clause respondent had bought the ship's time for a few days. We do not follow this argument, for if, by the demurrage clause, respondent had bought the ship's time for a few days it had bought it for the whole of June 27th and for an indefinite number of days. There is no limitation in the contract on this subject except the expression "June loading". In advancing the argument that respondent was liable to perform or deliver the 6200 tons on June 27th, libelant overlooks the fact that respondent was only required to deliver its cargo alongside the wharf "as fast as vessel can load". The contract furthermore required that a definite loading date should be specified by libelant. By its letter of June 22nd, libelant said, "Please note the delivery 6200 tons automobiles and parts, full quantity your engagement under contract dated February 25, must commence on that date, June 27th, and be completed not later than June 29th" (Apostles on Appeal, p. 351). Assuredly respondent had, by virtue of that notice, all of June 27th within which to commence deliveries (1500 tons had already been delivered and received as freight), and could continue such delivery during the whole of the 28th and 29th of June. This notice was a material act required under the contract, and libelant could not therein fix the time of delivery as of June 28th and 29th, and claim for the first time on this appeal that such delivery

should have been made wholly on June 27th. Libelant cannot thus play fast and loose. Again, if, as libelant says, the demurrage clause extended the time of performance on respondent's part, performance was not due when the libel was filed June 27th, because by the terms of the letter and telegram sent to respondent by libelant on the morning of the 28th of June, libelant stated definitely that "*the Steamship Cacique was ready to load your cargo contracted for on February 25th, 1916, on June 27th, 1916, at 9:00 P. M.* As you have failed to deliver the cargo alongside the steamer as fast as vessel can load, demurrage at the rate of \$3,000.00 per day commences *on the day and at the hour last mentioned*" (Apostles on Appeal, p. 141). The libel had been filed several hours before the hour so designated. If, as is admitted by libelant, the demurrage clause extended the time, such extension must be taken as beginning when the demurrage began, which would only be when delivery was to be made, for the contract provides that the demurrage should apply only if the cargo was not delivered alongside the steamer at San Francisco "*as fast as vessel can load*" (Apostles on Appeal, p. 448). The performance that the contract required of respondent was the delivery for loading of 6200 tons cargo "*as fast as vessel can load*". On June 27th the time so designated by libelant in the notice of June 22nd had more than two days yet to run; and by reason of the vessel's unseaworthy condition she could not have loaded on that day or until July 12th; and no

freight was or could have been loaded on June 27th or, in fact, at any time during June, according to the testimony of libelant's manager.

The argument that libelant was on June 27th ready, able and willing to perform the contract is wholly without support. Counsel says that because the trial Court found that libelant was *willing* to carry out the contract, it intended to hold that libelant was *ready and able* to perform. But the Court expressly decided otherwise. In the passage quoted from the Court's opinion, it is said: "On June 27th, however, the Cacique was not ready to take on cargo and could not have been ready to do so" (Apostles on Appeal, p. 450). If the vessel was not ready or able to load, libelant was not ready or able to carry out its contract, as the vessel was the only medium whereby libelant could perform its contract. If the vessel was not ready to load on June 27th, performance on respondent's part was not due on that day, for the only requirement of the contract was that respondent should deliver its cargo "as fast as vessel can load" (448). The evidence of libelant's manager was that the vessel did not discharge her inward cargo until the afternoon of July 8th (71, 72). He did not expect to commence loading before the 30th day of June, and became satisfied that the ship could not take on any freight before the last minute of the last day of June (211). Continuing he says libelant was not in a condition to load any freight on the Steamer Cacique on June 28th (223). The same witness admitted that by

reason of injuries to the vessel she would not have been permitted to sail without a seaworthy certificate from Lloyds, and that it was also necessary to fumigate the vessel (239, 228). Lloyds' Register of Shipping ordered the vessel to drydock in view of the report of the surveyor at Hongkong, and required that certain repairs be made. The surveyor testified that without such repairs the vessel was unseaworthy and would not have been permitted to go to sea (244). Captain Heppell, the surveyor for Johnson & Higgins, testified to the same effect (342, 343). There was no conflict in this testimony. Obviously, the vessel was unseaworthy until she had undergone repairs in drydock, which were completed on July 12th, and she was not ready to load, or able to perform, under the contract of affreightment, on the 27th day of June or at any time during June.

Libelant next contends "that it is immaterial under the contract that the steamer was not ready to load on June 27th". In our view of the case, and we might add in that also of the District Court, the want of readiness to load on libelant's part is a most material fact. The libel was filed on that day. As before stated, if the vessel was not ready to load, respondent was not obligated to deliver its cargo, and accordingly could not have breached its agreement on the 27th of June or at the time the libel was filed. Proctor for libelant in the preparation of his Reply Brief, realized that libelant had in writing on June 6th and 22nd announced that the steamer would be ready to load on June 27th and

had demanded that delivery of respondent's cargo should commence on June 27th and be completed on June 29th. The testimony of libelant's manager showed that it was impossible for libelant to load the cargo or any of it during those days, and, therefore, libelant now makes a virtue of necessity by admitting that the letter of June 22nd was an unwarranted demand on libelant's part, and libelant also admits that respondent was within its rights if it had sought to deliver its cargo after July 1st. It would seem that libelant in attempting to escape one horn of the dilemma, has impaled itself upon the other, for, if respondent was not required to deliver the cargo on June 27th, June 28th and June 29th, as directed by libelant's letter of June 22nd, it could have delivered such cargo on June 30th or at any other date or even after July 1st. It naturally follows that there was no actual breach on respondent's part when the libel was filed on June 27th. Upon that theory of the case respondent was free to borrow the 1500 tons from the Union Steamship Company after July 1st, a plan which Libelant's Brief has credited to the respondent. The fact remains, however, that the contract only required respondent to furnish cargo "as fast as vessel can load".

It would seem that in admitting that the steamer was not ready to load on June 27th, and that performance, in the sense of delivering the cargo, was not due on respondent's part on that day or ever in June, libelant must of necessity agree with the

decision that the libel was filed in advance of an actual breach of the contract. Proctor for libelant, however, attempts to escape this conclusion by the claim that performance under the contract was not merely the delivery of 6200 tons cargo. Proctor for appellant says that performance on respondent's part required that on June 27th respondent have available for loading 6200 tons of automobiles and parts. The fallacy of this argument is apparent. Availability of automobiles and parts for delivery was a negligible matter. Delivery of the stipulated quantity when delivery should become due was the essential act to constitute performance on respondent's part. The contract was one of affreightment, the object of which was to move by steamer the contracted tonnage, in order that the steamship owner might earn the freight money. No particular type of automobiles or parts was indicated, nor was it agreed that the cargo should be manufactured in February or in any other month or at any particular plant. All that the contract required was that 6200 tons of automobiles and parts, packed in a particular manner in respect of size and weight, should be delivered for cargo on the steamer named. The contract had reference, therefore, only to the delivery of the freight for shipment. Libelant's argument that respondent had previously made it impossible to perform the contract, was disposed of in the earlier pages of this brief, though the contention is wholly immaterial inasmuch as specific breaches by letter were alleged, and libelant was

not ready or able to load when its suit was filed. There was always the possibility, if not the certainty, of securing other automobiles and parts sufficient to satisfy the contract within the time that performance would become due on libelant's theory of the contract, especially as respondent was only required to deliver "as fast as the vessel could load".

Exception is taken to respondent's statement that the verified libel charges that the eleven hundred packages of freight were delivered in part performance. Respondent's statement is amply supported by Paragraphs V and VIII of the libel (Apostles on Appeal, pp. 11 and 13) and by the testimony of libelant's manager, who said these packages were delivered for shipment and held as freight (Apostles on Appeal, pp. 226, 230). There was but one contract.

Answering the matter on page 8 of Brief for Appellees, proctor for libelant says (p. 15): "Granting that the time for delivery on respondent's part had not arrived, the facts show that performance on respondent's part was commenced on May 1st and that the time for making the shipment of 6200 tons ready was long overdue on June 27th". Respondent certainly did not breach the contract by commencing to perform it on May 1st. There could be no shipment, in the sense of delivery for loading, until the vessel was ready to load. Time of shipment from other points, and time and place of man-

ufacture were wholly immaterial and not the subject of agreement at all.

It is not claimed that any notice or demand for delivery subsequent to that of June 22nd was ever given to respondent, nor is it apparently claimed by libelant that respondent breached the contract after June 27th, upon which day libelant seized respondent's cargo under admiralty process. It is not necessary to show that the case must stand or fall upon the sufficiency of the proof to sustain the breach alleged to have been committed prior to the filing of the libel on June 27th.

There was no question before the District Court, nor is there here, as to whether respondent breached the contract after July 1st or after the libel was filed. On June 27th libelant seized by process in rem the 1500 tons of freight or cargo then in its possession, and attached under process of foreign attachment all other automobiles and parts belonging to respondent and then in the yards of the Southern Pacific Company at San Francisco. During the presentation of the case the trial Court expressly asked proctor for libelant whether a breach occurring after the filing of the libel would support the suit, to which proctor for libelant replied, "No, I will rest on the breaches down to the time of the filing of the libel" (Apostles on Appeal, p. 443). This solemn and deliberate reply definitely fixed the rights of the parties in this case. Libelant could not have claimed otherwise, for its libel had alleged that libelant was ready, able and willing to perform

its contract at the time the libel was filed on June 27th, but that respondent had breached it by two letters, namely, one of June 14th and the other of June 24th. The District Court properly, in the light of these facts held that there was no actual breach of contract on respondent's part and that the suit was filed before breach had occurred.

THERE WAS NO ANTICIPATORY BREACH ON RESPONDENT'S PART.

The libel charged that respondent had breached the contract in anticipation of performance due by its letters of June 14th and June 24th, respectively. Issue was taken on these allegations. The District Court decided that if there had been an anticipatory breach or breaches prior to the filing of the libel, libelant had refused to accept such renunciation or breach on respondent's part and on the other hand had accepted part performance under the contract (451). In answering libelant's attack upon the decision we briefed the subject of anticipatory breach at pages 19 to 47, inclusive, of the Brief for Appellees. At page 23 and following we noted all the evidence to be found in the record and considered the law as declared by the Supreme Court of the United States and by the highest courts in other jurisdictions, noting also the cases cited by appellant in its former, and in this brief. We shall, therefore, at this time only refer to the points advanced by Libelant's Reply Brief on this branch of the case.

Appellant's first observation is that the decision as rendered ignored what libelant terms the "fundamental question" * * * "namely, the construction of the contract between the parties". Upon this premise, proctor for libelant argues that the case was not decided upon the merits, but upon purely technical grounds. The construction to be placed upon the contract was the subject of argument at the trial and the learned District Court in its decision held, "As the Court construes this contract, it fixed June as the time at which the Cacique should load the cargo of 6200 tons agreed to be furnished by respondent" (Apostles on Appeal, p. 449). The libel having charged only that respondent breached the contract in anticipation of performance due, and that charge being denied, the trial Court held, as above stated, that there was no anticipatory breach, because if the contract had been repudiated by respondent, libelant had refused to accept such renunciation and had accepted part performance under the contract. It is, therefore, clear that the question claimed by libelant to be the important one, was directly determined, and that the opinion actually decided the issue directly tendered by the pleadings. It is obvious that the decision was upon the merits, and not upon any technical or nonmeritorious grounds.

The 1100 packages or 1500 tons were delivered to libelant as freight and were so retained and libeled in rem as such freight which was acceptance of part performance under the contract.

Appellant attacks this finding of the District Court, with some variation as to form, at a great many places in its Reply Brief. We shall endeavor to co-ordinate the various charges, reduce the subject to the lowest common denominator and dispose of it now, once and for all. We are not contending that the 1100 packages of freight in libelant's possession at the time the suit was filed could not have been libeled in rem as freight if there had been an actual breach of the contract after performance thereof was due. We are not attacking the form of the remedy by a libel in rem if an actual breach of contract had occurred, but the Court held, and we have previously shown, that there was no such actual breach. It is practically admitted that performance was not due at the time the goods were libeled. The decision of the Court and the argument of respondent are not that the libeling in rem would not be a remedy for an actual breach of the contract, but that the libel in rem of the 1100 packages as freight evidenced the understanding and intention on the part of libelant, that the packages so libeled were accepted and held as freight by libelant and necessarily, therefore, as part performance of the only existing contract. By the delivery of the 1100 packages or 1500 tons for shipment as freight upon the steamer, respondent partly performed the contract,

and by accepting delivery of said packages and libeling them by process in rem as freight after notice of the alleged repudiation, libelant accepted part performance under the contract. The correctness of the Court's decision as a legal principle is unqualifiedly approved by the Supreme Court of the United States in the decisions cited at page 39 of the Brief for Appellees, and also in the case of *Marks v. Van Eighen*, 85 Fed. 853.

The argument, therefore, in so far as it concerns the 1100 packages or 1500 tons of freight, is reduced to the determination of two simple questions: (a) Were the 1100 packages received by libelant as freight and (b) were they, as such freight, libeled by process in rem?

The first of these questions is answered in the affirmation by the libel itself and by the testimony of libelant's manager, Mr. Carter, who on cross-examination admitted that these 1100 packages were received on the dock and ready for shipment on the *Cacique* (226); that they were received and libelant held them as freight (230); that libelant was not prevented by respondent from loading them upon the steamer when she did arrive at that dock up to the time the libel was filed (229). It is admitted by proctor for libelant that there was but one contract, accordingly the packages could have been delivered and received as freight only under the contract sued upon.

The second question is also answered in the affirmative by the process and return in this action, and by the testimony of libelant's manager, who testified that libelant foreclosed in this action its maritime lien on that freight (321).

The essential fact is that, assuming for the sake of the argument that the contract had been repudiated in part, or even in whole, libelant accepted part performance thereunder when it held the 1100 packages or 1500 tons as freight, and libeled the same in rem as freight within the admiralty and maritime jurisdiction. Counsel apparently misconceives the effect of these facts, and the force of the District Court's opinion, when he claims that the Southern Pacific Company asked libelant to redeliver this cargo. Libelant's manager, when questioned in that connection, said that these packages were on libelant's dock, ready to load, on June 27th, and that his company was not prevented by the Ford Motor Company from loading them. If, then, some employee of the Southern Pacific Company had asked (with or without warrant) the return of this cargo, no effort was made to get it, and nothing interfered with libelant's loading it when the vessel arrived, except the condition of the vessel. Libelant at least was free to elect whether to give up the cargo or to hold it as freight. It did the latter. Mr. Carter testified that he did not comply with the request of the Southern Pacific Company, but proceeded to foreclose his maritime lien upon this freight (321). This was after notice of any and all

alleged repudiations on respondent's part, and was a deliberate acceptance of part performance. This served to obviate any claimed breach by anticipation, and kept the contract alive for all purposes, requiring libelant to wait for the arrival of the time when in the ordinary course a cause of action on the contract would arise (*Wells v. Hartford Manila Paper Co.*, 55 Atl. 599; *Dingley v. Oler*, 117 U. S. 490.)

Libelant seeks to escape this result and the conclusion of the trial Court by now contending that the libel in rem did not evidence an understanding or acceptance of partial performance, but indicated a total breach. It is not questioned on our part that, where freight or cargo has been delivered and accepted as freight and an actual breach of contract occurs, the ship may enforce its maritime lien on the freight. Such are the cases cited in Libelant's Brief. But we do say that two conditions must exist to apply that rule: The freight must be loaded, or within admiralty jurisdiction, and there must have been a breach of contract. The 1100 packages, having been delivered on libelant's wharf ready for shipment and having been received and held by libelant as freight, as libelant's manager testified, were subject to the admiralty and maritime jurisdiction as alleged in the libel. There was no interference with libelant's possession (229-321). There was no actual breach of the contract, however, as elsewhere shown, for the vessel was not ready to load and the time for performance had not arrived. At

various places in its brief libelant has declared that performance was not due on respondent's part until after July 1st. This was destructive of the claim of an actual breach of contract on respondent's part, but it did not destroy the effect of the libel in rem as evidence of an accepted partial performance under the contract.

The difference between the libel in rem, acting as an enforcement of the maritime lien upon the freight as such, and the lien obtained by levy of process under foreign attachment, was too well known by proctor for libelant to have been lightly disregarded. The action in rem would not lie against these packages unless they had been delivered and were held as freight under the contract. The title of the action and the libel and other papers filed in libelant's behalf (and set forth at pages 363 and following of the Apostles) show the particular care exercised by libelant to establish the fact, also expressly testified to by libelant's manager, that these packages were delivered to and received and held by libelant as freight under this contract. They were so held at the time the libel was filed, and the libel expressly alleged that they were within the maritime and admiralty jurisdiction of the Court, which could only be so if they were freight.

There was nothing anomalous in the status of these 30 carloads of automobiles at the time the libel was filed. They were on libelant's wharf, ready for shipment on the vessel which had then arrived and docked. They were held by libelant as freight, as

libelant's manager testified. Libelant enforced its maritime lien, which it could only do if it had received and accepted them as freight. It follows, as a legal conclusion, and the District Court so determined, that this acceptance of part performance obviated any alleged repudiation of contract on respondent's part.

We will refer at this point to another matter, not that it has any legal significance, but because it is touched upon at various points in Libelant's Brief. It is stated that respondent stopped the delivery of, or attempted to withdraw, its cargo, and that the Southern Pacific delivered the same by mistake. In one instance it is said that respondent stopped the delivery after the Steamer Cacique arrived, on June 27th. This latter statement is wholly unsupported and, especially in view of the admission of libelant's manager that no communication was received from the Ford Motor Company after the steamer's arrival, we must assume that libelant refers to the correspondence with the Southern Pacific Company. That such is the case is shown by the argument at pages 22 and 23 of the Reply Brief. At that, libelant's statements or inferences are much broader than the facts justify. If the Southern Pacific Company's letter of June 27th was received on that day or before the libel was filed, a fact which was not established, and if the evidence in connection with the statements of the Southern Pacific Company were not stricken from the record by the Court's order (Apostles on Appeal, 258), the refer-

ence to respondent's letter of June 22nd could have no greater weight than the letter itself upon which libelant now bases its argument. This letter was dated at San Francisco June 22nd, and was quoted and considered at pages 34 and 35 of our former brief. It reads as follows:

“Dear Sir: Attention Mr. Frank Renz,
Steamer Clerk.

Confirming our telephone conversation of recent date: Until you are advised to do so, please do not, under any circumstances, deliver any of the cargo at present on hand booked Steamer ‘Cacique’ to W. R. Grace & Co.

Ford Motor Co.
Traffic Department,
L. C. Davis.”

It is significant that in its reference to this letter libelant omits the material clause “until you are advised to do so”.

These instructions did not repudiate the contract nor refuse to perform the contract nor declare a purpose not to perform the contract. Respondent's agent merely directed the Southern Pacific Company not to deliver cargo booked for the Cacique “until you are advised to do so”. At that time the vessel had not reached the Port of San Francisco. The delivery dates specified by libelant had not yet arrived, and obviously the vessel was not ready to load her cargo. Under all conditions, therefore, delivery on respondent's part through the railroad company was not due, and giving to the letter the broadest possible interpretation, it could not be said to constitute of itself a notice to the Southern Pa-

cific Company, much less to libelant, of a refusal to abide by the contract. If this letter, or the statement of a Southern Pacific employee is considered as evidence of a mistake on the part of the Southern Pacific Company in delivering the cargo, or as an effort to retake possession, whether such statements were justified or not by the instructions from respondent to the Southern Pacific Company, no one interfered with libelant's possession or prevented its loading these packages when the vessel arrived. Libelant did not consider the suggestion of the Southern Pacific seriously enough to return any of the cargo, but proceeded two days thereafter to foreclose its maritime lien thereon (Apostles, pp. 229, 321).

Libelant's letter of June 26th.

Replying to the argument of libelant and to the charge in its libel that the letters of June 14th, and June 24th, constituted a breach of contract in anticipation of performance due, we quoted at page 39 of our opening brief, the universally accepted rule of law to the point that the renunciation or repudiation does not of itself breach the contract, but that such renunciation must be treated and accepted by the other party as actually terminating the contract. If not so accepted, the contract is kept alive for all purposes. We argued that, assuming the letters referred to constituted a repudiation on respondent's part, libelant elected not to accept such breach, but continued the contract in full force and effect, not only by receiving and holding the 1100

packages as freight and foreclosing its maritime lien thereon, but by declining renunciation in its letter and telegram to respondent under date of June 26th. Thereby the contract was continued in force throughout the 27th, 28th and 29th days of June, during which days delivery of respondent's cargo was demanded by libelant. Libelant claims, however, in its Reply Brief, that this letter was an acceptance of a breach and an acquiescence in the total repudiation of the contract except insofar as libelant reserved the right to prosecute a claim for damages. A sufficient answer to this argument exists in the undoubted fact that libelant retained and accepted as freight the 1100 packages delivered upon its wharf for shipment on this vessel. This was part performance, and part performance of a contract and total repudiation of the contract cannot co-exist. However, we will meet libelant's argument squarely on the face of the letter and the telegram. The letter, which was addressed to respondent, is set out at page 138 of Apostles. It refers specifically to the contract and expressly acknowledges receipt of the letters of the 14th and 24th of June, which libelant claims in its libel, constituted the anticipatory breach. The letter then proceeds, "We now have to advise you that we stand strictly upon the contract made with you and insist upon your fulfillment of the same in every particular. We are and have always been ready to perform all our obligations under said contract." If respondent's letters, specifically referred to, had

tendered a breach of the contract or had repudiated the same, libelant had the right of election to say whether it would accept the breach or continue to perform the contract. It said, "We stand strictly upon the contract and insists upon your fulfillment." Such fulfillment could only be insisted upon if the contract was recognized as still existing. Again libelant said in its letter, "We are * * * ready to perform all of our obligations under said contract." Libelant could not be ready to perform its obligations under a contract which it recognized as non-existent or as terminated. When, therefore, it announced that it was ready to perform under this specific contract, it said as directly as human words could express it, that the contract was still alive and that libelant would perform it, and would insist upon respondent's performance.

Basing its argument upon the fact that respondent's letters had indicated that 4075 tons cargo only would be delivered, libelant gives to the word "satisfaction" as used in the letter of June 26th, a meaning which the context does not justify. The letter is dealing with freight to be delivered and not money to be paid. Respondent had offered 4075 tons, although in fact, it was delivering more, as freight under the contract. In the portion of the letter to which libelant refers, libelant said, "we further advise you that we will take such quantity of automobiles as are delivered to us * * * we will not accept such smaller quantity as a full satisfaction of the contract of February 25th, but only

as the partial satisfaction which it, in fact, is". The letter referred to a tender of cargo to be carried as freight under a contract of affreightment, and in view of that circumstance, the word, "satisfaction" must be taken as the equivalent of the word "performance" and the letter must be interpreted to mean "we will take such quantity of automobiles as are delivered to us not as a full performance of the contract, but only as the partial performance which it, in fact, is". This is emphasized by the fact that in the sentence quoted by libelant, respondent is advised that it will be held responsible for all damages, including demurrage, "which we may ultimately sustain by reason of any breach of said contract". If the letter had treated of a breach as already committed, the expression "any breach" would not have been employed, and if there had been a present or previous breach accepted or relied upon, libelant would have had at hand a measure of damage. In the portion of the letter first quoted above, libelant certainly declared that the contract was and would be continued in effect, for, as above stated, it announced its present intention to perform the same. Furthermore, the fact that libelant expressed its willingness to accept the 4075 tons as cargo, necessarily implied, shipment upon the Steamer Cacique because for that purpose only, it was offered. The legal effect was equivalent to an acceptance of partial performance, the consequence of which, as hereinbefore shown, was of necessity a rejection of a

total repudiation of the contract, if one had been so offered.

By this letter libelant stated in substance, "We will not make a new contract or release you from the old contract. We are prepared to perform our contract and insist that you shall do likewise. We shall accept the cargo which you offer as part performance and shall hold you in damages for any short cargo and for demurrage under the contract". This was consistent with the fact that libelant then held 1500 tons of cargo ready for shipment, and was also in line with the demand made by libelant on June 22nd, that respondent begin to deliver its cargo on June 27th and complete the delivery thereof by June 29th. In the same letter libelant had notified respondent that the steamer would arrive and be ready to load on June 27th. She was then expected, and arrived and docked at 7:30 o'clock on the morning of June 27th. The "change of front" referred to on pages 25 to 27 of our former brief, was the result of conditions of which libelant became aware on the morning of June 27th, and within a few hours after the docking of the steamer. Then, for the first time, libelant discovered its inability to load respondent's cargo on the 27th of June, or in fact, at any time in June, and filed its libel claiming an anticipatory breach on respondent's part, because such breach would save libelant performance on its part. In this connection, libelant asks why, in reason, it should not have carried out its contract in accordance with its letter and telegram of June

26th. This question is answered by the learned District Judge, who said that at the time the Libel was filed, the vessel was not ready to load and could not be made ready to load (450). One of the reasons was the inability to discharge the inland cargo before July 8th, and another reason was that the vessel was unseaworthy and could not have loaded respondent's cargo or cleared at the Port of San Francisco until she had been placed in drydock and undergone necessary repairs. Libelant asserts that we exaggerated the unseaworthiness of the vessel in our reference to that matter at pages 25 and 26 of our former brief. The evidence as to the condition of the vessel was furnished by libelant. This and the opinions of the surveyors were uncontradicted. No misstatement is claimed to have been made and no exaggeration was possible.

Libelant professes to see no merit in our suggestion that the notice from libelant to respondent was given on the morning of June 28th, that the steamer was ready to load at 9:00 P. M. on June 27th, whereas the libel was filed some hours earlier on the same day. To our minds, that indicates that if the vessel was not ready to load at 9:00 P. M. on June 27th, which has been clearly established and is practically admitted by libelant, the notice was false. If, on the other hand, the vessel was not ready to load until that hour, and such would be the force of the notice, the libel was filed prematurely, as it was anyway, because the delivery dates specified by libelant had not elapsed. The answer of

libelant's manager that by such notice he intended to advise the Ford Motor Company that the contract was still in force as to the demurrage clause, is tantamount to an admission that no earlier breach by anticipation had occurred or been accepted. If the contract had been breached by anticipation, it was not in effect at the time the libel was filed, and, therefore, there was no demurrage clause. If the contract had been breached by anticipation before the filing of the libel, it was wholly absurd for libelant to advise as it did in the letter of June 28th.

Under the rule as announced by the Supreme Court of the United States and in the cases cited at pages 39 and following of our Opening Brief, and universally followed, in order to effect an anticipatory breach of contract, there must be a renunciation and an adoption or acceptance, which, in effect, terminates the contract and excuses further performance thereof.

“The renunciation must be so distinct that its purpose is manifest and so absolute that the intention to no longer abide by the terms of the contract is beyond question. The acquiescence therein must be as patent. There must be no opportunity left to the promisee to thereafter insist upon performance if that shall prove more advantageous, or sue for damages for a breach if events shall render that course the more promising.”

The vital weakness of libelant's case was that assuming there had been an unequivocal or absolute repudiation, which was not a fact, libelant did not

accept it, when tendered, but kept the contract alive for all purposes, which required that libelant wait for the arrival of the time when, in the ordinary course, a cause of action on the contract would arise. This could only be when respondent should refuse to deliver its cargo alongside the wharf “as fast as the vessel can load”. Before that time arrived libelant filed suit and seized respondent’s cargo. Libelant had in possession as freight 1100 packages, or 1500 tons of cargo, and in order to enforce its maritime lien thereon by a libel in rem, it necessarily accepted and retained said packages as freight which constituted a part performance of the contract. The part performance so accepted destroyed the possibility of there being a total repudiation or setting aside of the contract and the District Court correctly so decided (*Wells v. Hartford Manilla Paper Company*, supra).

**ON THE MEANING OF THE TERM “SHIPMENT PER S. S.
CACIQUE JUNE LOADING.”**

On pages 47 to 64, inclusive, of Brief for Appellees, respondent endeavored to present this question so as to aid this Court as far as possible in arriving at a correct conclusion. We are criticized in Libelant’s Reply Brief for having limited the discussion too closely to the words “June loading”. Proctor for libelant says that the meaning of the clause must be determined by detaching the three words, “Cacique June loading”. We apprehend

that the Court, if it shall deem it necessary to particularly construe this clause, will construe the whole clause and with it the whole contract. Libelant seems to attach a tremendous importance to the non-existence of a comma. In its former brief, appellant claimed that we had introduced a comma between the word "Cacique" and the word "June". We deemed the suggestion unimportant and passed it without notice at that time, inasmuch as we had not written a brief and, therefore, could not have introduced a comma in anything filed in this Court. We would make no mention of the point at this time were it not for the fact that Libelant's Reply Brief charges that respondent introduced a comma in the briefs filed in the District Court, which statement was coupled with the insinuation that such act was done to gain an advantage for respondent. Though counsel admits that the comma was not inserted in our former brief, he says that it was "not attempted in the brief for appellees", but that respondent produced the same effect by detaching the words "June loading". We shall not attempt to defend ourselves against such an argument, but we shall claim the indulgence of the Court to the extent, at least, of showing that any imputation that the learned District Court was misled, or did not appreciate the absence of the much-mentioned comma, finds ready answer in the record. Proctor for libelant, in arguing the case in the trial Court, called particular attention to the fact that there was no comma between the word "Cacique" and the words "June

loading". He stated also, that he considered the comma of some importance in the interpretation of this clause and that inadvertently a comma had crept into the briefs filed on the demurrer to the answer (Apostles on Appeal, page 379).

Though at another place in its brief, perhaps in an attempt to minimize the importance of the point there under discussion, libelant stated that the construction of the contract as to the time of loading was "the fundamental question" on which the controversy turned, the allegations of the libel as well as the theories advanced by libelant in its Reply Brief, have given to the question as to whether libelant was required to load respondent's cargo in June, only secondary importance.

Assuredly, for the contract so provides and libelant in its Reply Brief so admits, respondent was not called upon to deliver its cargo, except "as fast as the vessel can load". Libelant's manager testified, the District Court found and it is not seriously questioned in the briefs, that the steamer was not ready to load respondent's cargo when the libel was filed or, in fact, at any time during June. Though libelant had demanded that respondent's deliveries for loading commence on June 27th and be completed on June 29th, it is now admitted that said notice was unwarranted under the terms of the contract (Reply Brief, pp. 6, 13). On the first of the cited pages libelant states that "a loading in July satisfied this contract". At page 13, it is announced that respondent would have performed the contract

by a delivery of its cargo “after July 1st, and, again, on page 20 libelant declares that a delivery on July 12th “was within respondent’s contract”. Accordingly, and because the vessel was not ready or able to load at the time the libel was filed, this provision could not serve to establish a breach if respondent failed to deliver its cargo before the libel was filed on June 27th.

The libel charged an anticipatory breach in advance of the time that performance was due. That issue depends upon two questions: Was there a total and unqualified renunciation of the contract on one side and, did the other party accept such renunciation so as to excuse performance on the part of both sides thereafter. The determination of that issue cannot be affected, whether “June loading” or “Cacique June loading” means loading in June or a loading at some other later or indefinite time.

Libelant correctly instances its importance on the effect of libelant’s responsibility in damages for a failure to move the cargo in June, but respondent is not pressing a claim for such damages in this Court.

The only other theory upon which the meaning of those terms could have any bearing, except a purely academic one, would be that libelant claims that respondent breached the contract in July or, at least, after the libel was filed. Such a claim could not be urged under the pleadings, and was expressly excluded by the following question propounded by the Court during the trial, and libelant’s answer thereto:

“The COURT. Q. And no after breach would support this libel, would it? COUNSEL FOR LIBELANT. No, I will rest on the breaches down to the time of the filing of the libel.”

We shall not, therefore, encroach upon the Court’s time by further discussion of this subject, it having, as we believe, been adequately presented in the cited pages of Brief for Appellees. We shall, however, briefly answer libelant’s argument wherever it is based upon the charge or assumption that a statement made by us in our former brief is either untrue or unwarranted. We shall do this, not because of the importance of the statements criticized, but because we believe that any statement by counsel to the Court should be marked by candor and a nice exactness. Our references will be to the evidence, which in our opinion sustains, the statement under criticism.

We stated in our former brief that on final analysis libelant’s argument then advanced was that “June loading” meant not a loading in June, but a loading sometime when the Cacique should return from her expected trip to Oriental ports (p. 48). Libelant objects to this statement and disclaims the making of such a foolish claim. Reference, however, to its former brief shows libelant claimed, at the bottom of page 47 and at the top of page 48, that the words “Cacique June loading” meant what was stated for said claim at the cited pages of our brief. We fail to see any difference between the evil resulting from a discussion of the detached

words “June loading” and the evil to flow from the discussion of the equally detached words “Cacique June loading”, which is made the basis of libelant’s present argument on the construction of the contract.

Our statements at pages 56 and 57, that libelant knew respondent wanted cargo space for “May or June sailing” and that our agent sought such space, are supported by the testimony of Mr. Davis (pp. 325 and 326 of Apostles), wherein he states that he asked for “June sailing” and showed his telegrams, which are set out at pages 361 and 265 of the same record, and which only authorized him to contract for space for May or June sailing. Our statement that the information that the vessel would sail in June was undoubtedly obtained from libelant’s officers, is based upon the testimony of Mr. Davis that all the information he had on that subject, was obtained from libelant’s officers (Apostles, 331).

We also adhere to our statement criticized at page 42 of Reply Brief for Libelant, that both Davis and respondent treated the contract as one for “June sailing”. This statement is to be found at page 61 of Brief for Appellees and is supported by the testimony there cited from the Apostles. The correspondence cited by libelant, in fact, the whole file introduced by libelant, clearly shows that respondent was arranging for shipping space to meet its requirements by months—and we so stated.

At various places in its Reply Brief libelant has indulged in abuse and insulting references to respondent. While such references are generally made for the purpose of prejudicing an opponent's case, they are, we believe, the weakest form of argument. At any rate, our sense of dignity and our respect for this justly distinguished Court, has dictated that we be not also transgressors in that regard, and we have, therefore, passed those matters unnoticed.

Though the law as to the incompetency of parol evidence to vary a written instrument, where reformation is not sought or a mistake is not pleaded, is too well settled to require authorities, we may remark that while such evidence may show what the parties meant by what they said, it cannot be used to show that they meant something different from what they said. Yet that is just what libelant is trying to do when it argues that "June loading" or "Cacique June loading" meant loading sometime after the Cacique had made a voyage to various Oriental ports and returned a second time to San Francisco.

In its Opening Brief, appellant urged that this appeal constituted a hearing *de novo*, and that amendments should be permitted to the libel and additional evidence received. No specific request was made, however. While the power of this Court in such matters, upon a proper showing and in a meritorious case was unquestioned, we showed in the Brief for Appellees that the exercise of the

Court's discretion is subject to certain salutary limitations, which apply with particular force to the instant case. Respondent also objected to any amendment or additional evidence because libelant had not applied for such relief within the time permitted by the Rules of this Court. Respondent earnestly objected, additionally, on the ground that by such proceeding or amendment respondent would suffer material injury and prejudice in its rights. At the oral argument, no express application was made for permission to amend the libel, or to introduce new or other evidence, but because libelant had been granted the privilege of filing an additional brief, proctor for respondent stated to the Court and to proctor for libelant, that it was our understanding that this case would be heard upon the record as it then stood and without amendment or additional evidence. Proctor for libelant, either actually or impliedly assented to that understanding and will not, we believe, now be permitted, after oral argument, to ask for such relief. It is true that libelant does not actually ask for such privilege, but it does assert in its latest brief, that it would be entitled to that relief if the Court shall take a view different from that of libelant upon certain propositions of law. Proctor for libelant has cited no law permitting this practice and we know of none. Rule 7 of the Rules in Admiralty of this Court, permits new allegations or new proof only upon application made within fifteen days after filing of the record and then upon four days' no-

tice. Respondent would object to any amendment of the libel, or the introduction of new evidence or the withdrawal of evidence or admissions made in the District Court. As before stated, appellant has not definitely made such request, but its Reply Brief contains several references to the propriety of such course and on page 50, proctor for libelant asserts the right to withdraw his admission in the District Court, that the case must stand or fall upon the breaches alleged to have occurred prior to the filing of the libel.

**ANSWER TO THE ARGUMENT THAT THE LIBEL SHOULD NOT
HAVE BEEN DISMISSED.**

The last few pages of the Reply Brief are devoted to the contention that the dismissal should not have been ordered. Apparently the theory is that though the cause of action failed, the action should survive.

This question was considered at pages 64 and following of Brief for Appellees. The anticipatory breach, as charged in the libel, was disproved because the evidence showed that if a breach was tendered, it was not accepted, but expressly rejected by libelant and part performance under the contract was, thereafter, accepted. The actual breach claimed in this Court could not have occurred because the time for performance had not arrived when the libel was filed. If a breach after suit were possible, such breach was expressly waived for the purposes

of this action (Apostles, 451). There was, therefore, no case and no possibility of a case, against respondent and the libel should of right have been dismissed.

We respectfully submit that the decree of the District Court should be affirmed.

Dated, San Francisco,
November 28, 1921.

W. F. WILLIAMSON,
Proctor for Appellees.

No. 3722

United States
Circuit Court of Appeals
For the Ninth Circuit.

E. VACHINA,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Nevada.

FILED
JAN 7 1912
U. S. DISTRICT COURT
SAN FRANCISCO

United States
Circuit Court of Appeals
For the Ninth Circuit.

E. VACHINA,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Nevada.

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RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

Messrs. M. B. MOORE and C. H. McINTOSH,
Reno, Nevada.

For the Plaintiff in Error.

Honorable WM. WOODBURN, United States Attorney for the District of Nevada, Reno, Nevada, and Mr. M. A. DISKIN, Assistant U. S. Attorney for the District of Nevada, Reno, Nevada.

For the Defendant in Error.

In the District Court of the United States, in and
for the District of Nevada.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

E. VACHINA,
Defendant.

Indictment for Violation of National Prohibition Act.

United States of America,
District of Nevada,—ss.

Of the February Term of the District Court of the United States of America, in and for the District of Nevada, in the year of our Lord, one thousand nine hundred and twenty-one.

The Grand Jurors of the United States of America, chosen, selected and sworn, within and for the District of Nevada, in the name and by the au-

thority of the United States of America, upon their oaths, do find and present:

That E. VACHINA, hereinafter called the defendant, heretofore, to wit: On or about the 29th day of December, A. D. 1920, at Reno, County of Washoe, State and District of Nevada and within the jurisdiction of this Court, after the date upon which the 18th amendment to the Constitution of the United States of America went into effect and before the finding of this Indictment, in violation of Section 3, Title II, of the Act of Congress dated October 28, 1919, known as "The National Prohibition Act" had in his possession intoxicating [1*] liquors; said intoxicating liquors containing one-half of one per centum, or more, of alcohol by volume, and being fit for use for beverage purposes;

CONTRARY to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

WM. WOODBURN,
United States Attorney.

Names of witnesses examined before the Grand
Jury on finding the foregoing Indictment:

P. NASH.

[Endorsed]: No. 5396. United States District Court, District of Nevada. The United States of America vs. E. Vachina. Indictment for Violation of the National Prohibition Act. A true bill. Miles E. North, Foreman. Filed this 31st day of March, A. D. 1921. T. J. Edwards, Clerk. By E. O.

*Page-number appearing at foot of page of original certified Transcript of Record.

Patterson, Deputy Clerk. Wm. Woodburn, U. S. Attorney. [2]

In the United States District Court, District of Nevada.

UNITED STATES

vs.

E. VACHINA.

Proceedings Had Before United States Commissioner—January 8, 1920.

BE IT REMEMBERED that the following proceedings were had and testimony introduced on the preliminary hearing of the defendant E. Vachina, on the 8th day of January, A. D. 1920, before Anna M. Warren, U. S. Commissioner:

Appearances: M. A. DISKIN, for United States.
M. B. MOORE, for Defendant.

Mr. MOORE.—I desire to have made part of the record upon the hearing on motion to quash the affidavit filed in this case on the 28th day of December, 1920, taken before U. S. Commissioner Anna M. Warren, and made by P. Nash. I desire to have a copy of this affidavit included in the transcript of this hearing.

United States of America,
District of Nevada,
County of Washoe,—ss.

AFFIDAVIT.

On this 28th day of December, A. D. 1920, before me, Anna M. Warren, a United States Com-

missioner for the District of Nevada, personally appeared P. Nash, who being first duly sworn deposes and says: [3]

That he is and at all times herein mentioned was a Federal Prohibition Enforcement Agent in and for the District of Nevada and as such makes this affidavit and presents the facts, circumstances and conditions hereinafter set forth that heretofore came to the knowledge of and were ascertained by affiant for the purpose of having issued hereon and hereunder a search-warrant, under and pursuant to the provisions of Title II of the National Prohibition Act, respecting the issuance of search-warrants, to search the following described premises, to wit: The Alpine Winery together with all rear rooms, basements, and attic, cupboards, and every portion of said soft drink establishment situated at 116 North Center Street, in the City of Reno, County of Washoe, State of Nevada, Vachina Brothers proprietors; that affiant has knowledge and information that in and upon the aforesaid premises, and since Title II of the said National Prohibition Act went into effect, to wit, after the first day of February,. A. D. 1920, intoxicating liquor containing one-half of one percentum of alcohol, or more, by volume was and now is being manufactured, sold, kept, or bartered, for and fit for beverage purposes, in violation of Title II of the said National Prohibition Act and particularly of section 21 of said Title II.

That the facts, circumstances and conditions of which affiant has knowledge, and as ascertained by

affiant are as follows, to wit: Direct information by a certain citizen of Reno, whom affiant has known for several years and whom he considers absolutely credible and reliable, but whose name cannot be stated on this affidavit, that on the 24th day of December, 1920, said informant and a friend purchased alcoholic liquors from the proprietor [4] of said Alpine Winery, said liquor being served and sold from the back room (kitchen) of said soft drink establishment. Said information was given to affiant under oath.

That it will be necessary to search the above mentioned premises in order to secure the said intoxicating liquor and apparatus for the manufacture of same for the United States Government and that it will be impossible to secure the aforesaid intoxicating liquor and apparatus for the manufacture of same without the aid and use of a search-warrant.

WHEREFORE affiant prays that a warrant to enter the above-mentioned premises and there to search for the said intoxicating liquor and apparatus for the manufacture of same be issued pursuant to the statutes in such case made and provided.

(Signed)

P. NASH.

Subscribed and sworn to before me this 28th day of December, 1920.

[Seal]

ANNA M. WARREN,

United States Commissioner.

Mr. MOORE.—I believe it will be admitted that this is the search-warrant issued?

Mr. DISKIN.—Yes.

Testimony of P. Nash, for Defendant.

Testimony of P. NASH, called on the part of defendant, being first duly sworn, testified as follows:

Direct Examination.

Mr. MOORE.—You are the same P. Nash who made the affidavit just presented in evidence?

A. Yes.

Q. Did you at the time this affidavit was made and before the issuance of this search-warrant make any other affidavit or sworn [5] statement other than this affidavit which is presented here?

A. I did.

Q. Was that taken down in writing?

A. It was.

Q. Did it include any other facts than are set out in this affidavit? A. No.

Q. At the time you made this affidavit, Mr. Nash, you had no personal knowledge of any of the statements made here, that is from investigations made by yourself? A. How do you mean?

Q. Had you seen anybody buy anything there?

A. I could not very well, I have never been there myself.

Q. You hadn't been in yourself? A. No.

Q. The only facts presented was what had been told you by some other person?

A. Yes, that is all.

Q. And you didn't bring that person before the commissioner and have him or her, whoever it may

(Testimony of P. Nash.)

be, make the statement under oath to the commissioner?

A. No, I didn't bring him or her before the commissioner.

That is all.

Cross-examination.

Mr. DISKIN.—(Q.) Did you at the time you received this statement from your informant administer an oath to the informant to tell the truth?

A. I did, to tell the truth, the whole truth and nothing but the truth and I took the statement down in writing and asked him to sign it.

Q. And prior to the issuance of the search-warrant did you disclose to the Commissioner the name of your informant? A. I did. [6]

Q. That diagram that appears upon the affidavit for a search-warrant, where did you get the information wherein you set forth the facts on that diagram?

A. It is a diagram made for me by the informant. That is all.

Redirect Examination.

Mr. MOORE.—(Q.) You had been in the place before had you not?

A. Yes, I was in there once.

Q. You knew where the liquor was?

A. No, I didn't know where the liquor was kept.

Q. You knew the condition of affairs, how the rooms were?

A. I was not positive. You see the other time we went in we found practically the same thing as

(Testimony of P. Nash.)

we found this time except the demijohn was on the back porch.

Mr. MOORE.—I move that be stricken out as not responsive.

A. You mean the diagram of the rooms?

Q. Yes.

A. I was there once before. Whilst I could remember the general plan of the rooms I was glad to get the diagram from the informant.

Q. The party whom you have reference to in this affidavit is a citizen of Reno? A. He is.

Q. And was here in town at the time you made this affidavit. A. Yes, I guess he was.

Q. But you did not bring or attempt to bring him before the commissioner and have him make an affidavit? A. No.

That is all.

Mr. MOORE.—I now move that the warrant be quashed.

COMMISSIONER.—The motion is denied. [7]

Mr. MOORE.—I reserve an exception and ask that you certify the record as it is taken to the District Court at Carson.

Testimony of P. Nash, for Plaintiff.

Testimony of P. NASH, called on the part of plaintiff, being first duly sworn, testified as follows:

Direct Examination.

Mr. DISKIN.—(Q.) What is your full name?

A. P. Nash.

Q. What is your business?

(Testimony of P. Nash.)

A. Federal Prohibition Enforcement Agent.

Q. Were you such officer on the 29th day of December, 1920. A. I was.

Q. Do you know the defendant E. Vachina?

A. Yes, sir.

Q. Do you know the premises designated as the Alpine Winery? A. Yes.

Q. Where situated?

A. North Center Street directly opposite the police station.

Q. In what city, town or state?

A. City of Reno, State of Nevada.

Q. Did you have occasion to visit the premises on or about the 29th day of December, 1920?

A. I did.

Q. Who was with you?

A. Agent Brown and Sheehan.

Q. Who did you find in the premises?

A. Found the defendant E. Vachina.

Q. Where was he?

A. In the back room of the soft drink establishment.

Q. Describe the rooms? [8]

A. The bar-room facing Center Street, then there is a vacant room apparently been used for a dining-room, a table in there, I think that is all; then there is a partition and comes this room where we found defendant that has a stove in it and a rack for dishes.

Q. Any one else in there besides the defendant?

A. A newsboy or messenger-boy sitting next to

(Testimony of P. Nash.)

the door, as soon as we entered he left.

Q. What was the defendant doing?

A. Putting the back curtain up, his back was toward the door.

Q. What if anything did you find on the premises at that time

A. The first thing I did was to hand the defendant a copy of the search-warrant as he turned away from the window from putting up the back curtain, told him we were officers to search the premises and Mr. Brown picked up the two bottles.

Q. Did he do that in your presence? A. Yes.

Q. Where did he find the bottles?

A. The jackass was against the table and the demijohn of wine close to the wall right up against the sink.

Q. What kind of a container was the jackass in?

A. In a quart bottle and the wine in a wicker covered demijohn.

Q. How much jackass in the bottle?

A. About two-thirds or three-quarters full.

Q. Did you make an examination of it?

A. I did, I tasted it and it is liquor called jackass. It is good quality. I tasted the wine, it is red wine.

Q. Did defendant make any statement to you at that time? A. None whatever. [9]

Q. You testified it occurred at Reno, Washoe County, Nevada.

A. Yes. I gave the defendant a receipt for the two articles seized.

(Testimony of P. Nash.)

Q. Did you see anything on the table?

A. Saw two or three glasses on this table in the back room.

That is all.

Cross-examination.

Mr. MOORE.—(Q.) There were lots of other dishes there too?

A. Yes, there were other dishes there.

Q. Any fire in the stove.

A. There was a fire in the stove.

Q. What time in the evening was this?

A. Seven o'clock, I think, or thereabouts.

Q. Do you know whether there were any dirty or soiled dishes in the kitchen?

A. I don't know that.

Q. You don't know whether a meal had been served in the large dining-room?

A. It didn't look to me as if any meal had been served.

Q. You don't know?

A. I don't know, I was not there.

Q. At the time you went there you had a search-warrant?

A. Yes, that is the original search-warrant, I left a copy with the defendant.

Q. What date was it you made that search? [10]

A. The 29th, I think.

Q. Prior to the issuance of this search-warrant you had made this affidavit?

A. Yes, that is the affidavit.

Q. That is the only affidavit which you made be-

(Testimony of P. Nash.)

fore the commissioner, or that was made before the issuance of the search-warrant? A. Yes.

Mr. MOORE.—I wish a copy of the affidavit and a copy of the search-warrant, together with the return included in the record.

Q. This is the return you made? A. Yes.

That is all.

Mr. DISKIN.—That is our case.

The search-warrant reads as follows, with the return thereon:

SEARCH-WARRANT.

The President of the United States of America, to the United States Supervising Prohibition Enforcement Agent, His Deputies, or any or either of them, GREETING:

WHEREAS, P. NASH has heretofore, to wit, on the 28th day of December, 1920, filed with me, Anna M. Warren, a United States Commissioner in and for the District of Nevada, at Reno, Nevada, his affidavit in which he states that he is a Federal Prohibition Enforcement Agent acting under the United States Supervising Agent at San Francisco, California; that in and upon those certain premises situated at 116 North Center Street in the City of Reno, County of Washoe, State of Nevada, known as the Alpine Winery, [11] together with all rear rooms, basements, and attics, cupboards and every portion of said soft drink establishment proprietors of said Alpine Winery being Vachina Brothers; that affiant has knowledge and information that there is located and concealed, stored and kept, sold,

possessed and bartered and fit for beverage purposes, in violation of Title II of said National Prohibition Act and particularly in violation of section 21 of said Title II thereof intoxicating liquor containing one-half of one per centum or more of alcohol by volume; that it will be impossible for the United States Government to obtain possession of said intoxicating liquor without a search-warrant to enable the search to be made of the premises hereinabove described, whereupon affiant prays that a search-warrant issue.

NOW, THEREFORE, pursuant to section 25, Title II of the Act of October 28, 1919, known as the National Prohibition Act you are hereby authorized and empowered to enter said premises hereinabove described, in the daytime or in the night-time and thoroughly to search each and every part of said premises for the said intoxicating liquor concealed in violation of the Act of October 28, 1919, and to seize the same and take it into your possession to the end that the same may be dealt with according to law, and hereof to make due return with a written inventory of the property seized by you or any or either of you without delay.

WITNESS my hand this 28th day of December, 1920.

ANNA M. WARREN,
U. S. Commissioner in and for the District of
Nevada. [12]

RETURN.

Reno, Nevada, Dec. 30, '20.

Make returns on within warrant as follows:

Searched premises described within on Dec. 29th, 7 P. M., 1920. Seized as evidence one qt. bottle containing J. A. brandy from back room, and one 1 gal. d. j. containing wine. Arrested proprietor, E. Vachina.

I, P. Nash, the officer by whom this warrant was executed, do swear that the above inventory contains a true and detailed account of all property taken by me on the warrant.

(Signed) P. NASH,
Fed. Pro. Agt.

State of Nevada,
County of Washoe,—ss.

I, Anna M. Warren, do hereby certify that the foregoing transcript is a full, true and correct transcript of the testimony taken at the preliminary hearing in the above-entitled action; that the testimony was taken in shorthand and thereafter transcribed by myself.

ANNA M. WARREN,
U. S. Commissioner.

[Endorsed]: U. S. vs. E. Vachina. Proceedings before U. S. Comr. Filed Feby. 4th, 1921. T. J. Edwards, Clerk U. S. Dist. Court, Dist. Nevada.

Before United States Commissioner ANNA M.
WARREN, of the United States District Court
for the State of Nevada.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ED VACHINI,
Defendant.

Notice of Motion to Quash.

To the Above-named Plaintiff, and WILLIAM
WOODBURN, U. S. District Attorney for the
District of Nevada:

You, and each of you, will please take notice that on Friday, the 7th day of January, 1921, at the hour of 2 o'clock P. M., or as soon thereafter as counsel can be heard, that the above-named defendant will move the Commissioner, Anna M. Warren, at her office in the Washoe County Bank Building, in the City of Reno, Washoe County, Nevada, to quash, set aside and hold for naught the search-warrant issued by the said Anna M. Warren, as United States Commissioner in and for the District of Nevada, on the 28th day of December, A. D. 1920. That said motion will be made upon the grounds that there was no sufficient affidavit or deposition made, taken or filed with or before said Commissioner showing probable cause of any offence sufficient to warrant the issuance of said search-warrant. That there will be used upon the hearing of said motion the affidavit of P. Nash,

made and filed before the said Anna M. Warren, Commissioner aforesaid, on the 28th day of December, 1920, upon which [14] said search-warrant was issued; also, the oral testimony of the said P. Nash, and all of the files of said cause in said Commissioner's court.

Dated this 6th day of January, 1921.

MOORE & McINTOSH,
Attorneys for the Above-named Defendant.

[Endorsed]: Before U. S. Commissioner Anna M. Warren, of the U. S. District Court for the State of Nevada. United States of America, Plaintiff, vs. Ed Vachini, Defendant. Notice of Motion to Quash. Filed Feby. 4th, 1921. T. J. Edwards, Clerk U. S. Dist. Court, Dist. Nevada. Moore & McIntosh, Attorneys at Law, Reno, Nevada, Attorneys for Defendant. [15]

Before United States Commissioner ANNA M.
WARREN, of the United States District Court
for the State of Nevada.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ED VACHINI,
Defendant.

Motion to Quash.

Comes now the defendant above named and moves the Court to quash, set aside and hold for naught the search-warrant issued out of the above-entitled court on the 28th day of December, 1920, against

the premises at No. 116 North Center Street, in the City of Reno, Washoe County, Nevada, known as the "ALPINE WINERY," said premises being occupied by the above-named defendant, on the grounds and for the reasons that no sufficient affidavit and no sufficient deposition or depositions were filed or taken by the said Commissioner before the issuance of said search-warrant showing probable cause for the issuance thereof.

Dated, this 6th day of January, 1921.

MOORE & McINTOSH,

Attorneys for the Above-named Defendant.

[Endorsed]: Before U. S. Commissioner Anna M. Warren, of the U. S. District Court for the State of Nevada. United States of America, Plaintiff, vs. Ed Vachini, Defendant. Motion to Quash. Filed Febry. 4th, 1921. T. J. Edwards, Clerk U. S. Dist. Court, Dist. Nevada. Moore & McIntosh, Attorneys at Law, Reno, Nevada, Attorneys for Defendant. [16]

In the United States District Court, District of Nevada.

UNITED STATES,

Plaintiff,

vs.

ED VACHINA,

Defendant.

Motion to Quash.

Comes now the defendant above named, and renews his motion to quash, set aside and hold for naught the search-warrant issued by Anna M. Warren, one of the Commissioners of the above-entitled court, on the 28th day of December, A. D. 1920, said motion having been made in said Commissioner's Court, and heard on the 8th day of January, A. D. 1921, by the said Anna M. Warren, Commissioner aforesaid.

Dated this 19th day of April, 1921.

MOORE & McINTOSH,
Attorneys for Defendant.

[Endorsed]: No. 5396. In the United States District Court, District of Nevada. United States, Plaintiff, vs. E. Vachina, Defendant. Motion. Filed April 21, 1921. E. O. Patterson, Clerk. Moore & McIntosh, Attorneys at Law, Reno, Nevada. [17]

In the United States District Court, District of Nevada.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
ED VACHINA,
Defendant.

Notice of Motion to Quash.

To the Above-named Plaintiff, and WILLIAM WOODBURN, U. S. District Attorney for the District of Nevada:

You, and each of you, will please take notice that on Tuesday, the 25th day of April, A. D. 1921, at the hour of 10 o'clock, or as soon thereafter as counsel can be heard, at the United States Federal Post Office Building, in Carson City, Nev., in the courtroom of the said above-entitled District Court, in said building, and before the Honorable E. S. Farrington, Judge of said District Court, the above-named defendant will move the Court to quash, set aside and hold for naught the search-warrant issued by Anna M. Warren, a United States Commissioner in and for the District of Nevada, on the 28th day of December, 1920. That said motion will be made and based upon the grounds that there was no sufficient affidavit or deposition made, taken or filed with or before said commissioner, showing probable cause of any offense sufficient to warrant the issuance of said search-warrant. That there will be used upon the hearing of said motion, the files, records and all proceedings had and taken before the said Commissioner, and forwarded by said Commissioner to the Clerk of the [18] said United States District Court; and the oral testimony of P. Nash and H. P. Brown, and of the said William Woodburn, United States District Attorney aforesaid, and the files in said cause now in the office of the said Clerk of the District Court. That at the said time and place,

and upon the grounds and for the reason hereinbefore set forth, and all of them, the defendant will move the Court for the return of all property to the defendant and to the premises, seized by the said P. Nash and his associates from the said premises under the said search-warrant, and for the further reason that the seizure and removal of said property was in violation of defendant's constitutional rights under and by virtue of the 4th Amendment to the Constitution of the United States.

Dated this 19th day of April, 1921.

MOORE & McINTOSH,
Attorneys for Defendant.

[Endorsed]: No. 5396. In the United States District Court, District of Nevada. United States of America, Plaintiff, vs. E. Vachina, Defendant. Notice of Motion to Quash. Filed April 21, 1921. E. O. Patterson, Clerk. Wm. Woodburn, U. S. Atty., Moore & McIntosh, Attorneys at Law, Reno, Nevada. [19]

In the United States District Court, District of Nevada.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

E. VACHINA,
Defendant.

Motion to Quash.

Comes now the defendant above named, and moves the Court to quash, set aside and hold for

naught the search-warrant issued by Anna M. Warren, one of the Commissioners of the above-entitled court, on the 28th day of December, A. D. 1920, said search-warrant directing a search of the premises at #116 North Center Street, in the City of Reno, Washoe County, Nevada, known as the "ALPINE WINERY," and occupied by the above-named defendant, and moves the Court, further, to direct the return of one bottle containing jackass brandy, and one wicker covered demijohn or bottle containing wine, claimed to have been seized in said premises and taken therefrom by one P. Nash, and is now in the possession of the said P. Nash or in the possession of William Woodburn, Jr., United States District Attorney, which the said William Woodburn, United States District Attorney, intends to use at the trial of this defendant in an indictment now pending against him in this court, said motion being based upon the grounds that the affidavit made and filed in said cause for the issuance of said search-warrant was insufficient, and did not allege facts sufficient from [20] which the Commissioner or magistrate could find or determine that probable cause existed that any offense was being committed in said premises or by said defendant; that said affidavit is based purely on hearsay; that no sworn deposition was made or filed before said Commissioner showing probable cause of any offense sufficient to warrant the issuance of said search-warrant, and that there were not sufficient allegation of facts or circumstances in said affidavit to warrant or justify the Commissioner in issuing a

search-warrant for said premises. That said search-warrant was in violation of the defendant's constitutional rights as guaranteed to him under and by virtue of the 4th amendment to the Constitution of the United States and that said search and seizure of said goods alleged by the said officers to have been taken therefrom is and will be in violation of defendant's constitutional rights guaranteed to him under the 4th Amendment to the Constitution of the United States and under the 5th Amendment to the Constitution of the United States.

Dated this 19th day of April, 1921.

MOORE & McINTOSH,

Attorneys for Defendant.

[Endorsed]: No. 5396. In the United States District Court, District of Nevada. United States, Plaintiff, vs. E. Vachina, Defendant. Filed April 21, 1921. E. O. Patterson, Clerk. Motion to Quash. Wm. Woodburn, U. S. Atty., Moore & McIntosh, Attorneys at Law, Reno, Nevada. [21]

Defendant's Exhibit No. 1.

United States of America,
District of Nevada,
County of Washoe,—ss.

AFFIDAVIT.

On this 28th day of December A. D. 1920, before me, Anna M. Warren, a United States Commissioner for the District of the State of Nevada, personally appeared P. Nash, who being first duly sworn deposes and says:

That he is and at all times herein mentioned was a Federal Prohibition Enforcement Agent in and for the District of Nevada and as such makes this affidavit and presents the facts, circumstances and conditions hereinafter set forth that heretofore came to the knowledge of and were ascertained by affiant for the purpose of having issued hereon and hereunder a search-warrant; under and pursuant to the provisions of Title II of the National Prohibition Act, respecting the issuance of search-warrants, to search the following described premises, to wit: The Alpine Winery, together with all rear rooms, basements, and attics, cupboards, and every portion of said soft drink establishment, situated at 116 North Center Street, in the City of Reno, County of Washoe, State of Nevada, Vachina Brothers proprietors.

That affiant has knowledge and information that in and upon the aforesaid premises, and since Title II of the said National Prohibition Act went into effect, to wit, after the first day of February, A. D. 1920, intoxicating liquor containing one-half of one per centum of alcohol, or more, by volume was and now is being manufactured, sold, kept, or bartered, for and fit for beverage purposes, in violation of said Title II of the said National Prohibition Act and particularly of section 21 of said Title II. [22]

That the facts, circumstances and conditions of which affiant has knowledge, and as ascertained by affiant, are as follows, to wit: Direct information to affiant by a certain citizen of Reno, whom affiant

has known for several years and whom he considers absolutely creditable and reliable, but whose name cannot be stated on this affidavit, that on the day of the 24th of December, 1920, said informant and a friend purchased alcoholic liquors from the proprietor of said Alpine Winery, said liquor being served and sold from the back room (kitchen) of said soft drink establishment. Said information was given to affiant under oath.

That it will be necessary to search the above-mentioned premises in order to secure the said intoxicating liquor and apparatus for the manufacture of same for the United States Government and that it will be impossible to secure the aforesaid intoxicating liquor and apparatus for the manufacture of same without the aid and use of a search-warrant.

WHEREFORE affiant prays that a warrant to enter the above-mentioned premises and there to search for the said intoxicating liquor and apparatus for the manufacture of same be issued pursuant to the statutes in such cases made and provided.

P. NASH.

Subscribed and sworn to before me this 28th day of December, 1920.

[Seal]

ANNA M. WARREN,
United States Commissioner.

[Endorsed]: Filed Feby. 4th, 1921. T. J. Edwards, Clerk U. S. Dist. Court, Dist. Nevada. [23]

SEARCH-WARRANT.

The President of the United States of America,
To the United States Supervising Prohibition
Enforcement Agent, His Deputies, or Any or
Either of Them: GREETING:

WHEREAS, P. NASH has heretofore, to wit, on the 28th day of December, 1920, filed with me, Anna M. Warren, a United States Commissioner in and for the District of Nevada, at Reno, Nevada, his affidavit, in which he states that he is Federal Prohibition Enforcement Agent acting under the United States Supervising Agent at San Francisco, California; that in and upon those certain premises situated at 116 North Center Street in the City of Reno, County of Washoe, State of Nevada, known as the Alpine Winery, together with all rear rooms, basements, and attics, cupboards, and every portion of said soft drink establishment; proprietors of said Alpine Winery being Vachina Brothers; that affiant has knowledge and information that there is located and concealed, stored and kept, sold, possessed and bartered and fit for beverage purposes, in violation of Title II of said National Prohibition Act and particularly in violation of section 21 of said Title II thereof intoxicating liquor containing one-half of one per centum or more of alcohol by volume;

That it will be impossible for the United States Government to obtain possession of said intoxicating liquor without a search-warrant to enable the search to be made of the premises hereinabove de-

scribed, whereupon affiant prays that a search-warrant issue.

NOW, THEREFORE, pursuant to section 25, Title II of the Act of October 28, 1919, known as the National Prohibition Act [24] you are hereby authorized and empowered to enter said premises hereinabove described, in the daytime or in the night-time, and thoroughly to search each and every part of said premises for the said intoxicating liquor concealed in violation of the Act of October 28, 1919, and to seize the same and take it into your possession to the end that the same may be dealt with according to law and hereof to make due return with a written inventory of the property seized by you or any or either of you without delay.

WITNESS my hand this 28th day of December, 1920.

ANNA M. WARREN,

U. S. Commissioner in and for the District of Nevada.

[Endorsed]:

Reno, Nevada, Dec. 30th, '20.

Make returns on within warrant as follows:

Searched premises described within on Dec. 29th, 7 P. M., 1920.

Seized as evidence one qt. bottle containing j. a. brandy from back room, and one gal. d. j. containing wine.

Arrested proprietor, A. Vachina.

I, P. Nash, the officer by whom this warrant was executed, do swear that the above inventory contains

a true and detailed account of all property taken by me on the warrant.

P. NASH,
Fed. Pro. Agt.

Aff. S. Warrant & Sketch. Filed Feby. 4th, 1921.
T. J. Edwards, Clerk U. S. Dist. Court, Dist.
Nevada.

No. 5396. U. S. District Court, District of
Nevada. The United States vs. E. Vachini. Defts.
Ex. 1. Filed May 2, 1921. E. O. Patterson, Clerk.
[25]

In the District Court of the United States for the
District of Nevada.

No. 5396.

THE UNITED STATES

vs.

E. VACHINA.

Verdict.

We, the jury in the above-entitled cause, find the
defendant guilty as charged in the indictment.

Dated May 7th, 1921.

G. B. SPRADLING,
Foreman.

[Endorsed]: No. 5396. U. S. District Court,
District of Nevada. The United States vs. E.
Vachina. Verdict. Filed May 7th, 1921. E. O.
Patterson, Clerk. [26]

INDICTMENT FOR VIOL. NATIONAL PROHIBITION ACT.

No. 5396.

THE UNITED STATES

vs.

E. VACHINA.**Minutes of Court — March 31, 1921 — Order for Issuance of Capias.**

The Grand Jury impaneled in and by this Court having this day presented a true bill of indictment in this case, it is ordered that a capias issue herein returnable forthwith, and that, when apprehended, the defendant may be admitted to bail upon giving a good and sufficient bond in the sum of \$1,000.00.
[27]

Minutes of Court—April 2, 1921—Arraignment.**INDICTMENT FOR VIOLATION OF
NATIONAL PROHIBITION ACT.**

(No. 5396.)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. VACHINA,

Defendant.

This defendant appeared this day with his attorney, Mr. M. B. Moore, and was duly arraigned upon the said indictment as provided by law. He

declared his true name to be E. Vachina and pleaded not guilty as charged in the indictment.

**Minutes of Court—April 4, 1921—Order Setting
Time of Trial.**

**INDICTMENT FOR VIOL. NATIONAL PRO-
HIBITION ACT.**

(No. 5396.)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. VACHINA,

Defendant.

Upon motion of Mr. Woodburn, U. S. Attorney, it is ordered that the trial of this case be, and the same is hereby, set for Wednesday, May 4th, next, to follow No. 5374. [28]

**Minutes of Court — May 2, 1921 — Petition for
Return of Property and Motion to Quash.**

**INDICTMENT FOR VIOL. NATIONAL PRO-
HIBITION ACT.**

(No. 5396.)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. VACHINA,

Defendant.

Mr. M. B. Moore, attorney for the defendant herein, presented, read and argued in support of his petition for the return of property and his motion to quash; during his argument he presented the affidavit for and the search-warrant used at the time of seizure; same was admitted and ordered marked Defts. Ex. No. 1. Mr. M. A. Diskin, Assistant U. S. Attorney, argued in opposition to the petition and motion. At the conclusion of the arguments the matters were ordered submitted.

**Minutes of Court—May 3, 1921—Order Denying
Petition for Return of Property and Motion to
Quash.**

**INDICTMENT FOR VIOL. NATIONAL PRO-
HIBITION ACT.**

(No. 5396.)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. VACHINA,

Defendant.

Ordered that the petition for the return of certain seized property and the motion to quash the search-warrant be, and the same are hereby, denied. To which ruling Mr. M. B. Moore, attorney for defendant, asks and is granted the benefit of an exception.

Minutes of Court—May 7, 1921—Trial.

INDICTMENT FOR VIOL. NATIONAL PROHIBITION ACT.

(No. 5396.)

THE UNITED STATES

vs.

E. VACHINA.

This cause coming on regularly for trial this day, Mr. M. A. Diskin, Assistant U. S. Attorney, appeared on behalf of the plaintiff; Mr. M. B. Moore for defendant, who was also present, and who entered his plea of not guilty, at this time. The following named jurors were accepted by the parties and duly sworn to try the issue, to wit: J. T. Brady, E. H. Bath, Walter G. I. Haugner, Alfred M. Smith, Geo. J. Robsen, John Cosser, Wm. Byers, Clarence W. Henningsen, Geo. B. Spradling, E. M. Sullivan, Henry P. Karge and Clarence Reudy. The indictment was read to the jury by the clerk and the plea of the defendant stated. Mr. Diskin waived opening statement on behalf of plaintiff. The following named witnesses were each duly sworn and testified in support of the indictment, viz: H. P. Brown, P. Nash and S. C. Dinsmore; during this testimony plaintiff introduced in evidence, under objection and exception, by defendant, 1 one-gallon demijohn and contents, ordered admitted, filed and marked "Plff's Ex. No. 1," also 1 bottle and contents ordered ad-

mitted, filed and marked "Plff's Ex. No. 2." Plaintiff rests. No testimony was offered on the part of defendant. Mr. Diskin made his opening argument on the part of plaintiff, and all argument was waived by defendant, and the jury having been first instructed by the Court, to which instructions no exceptions were taken, retired in charge of the marshal to deliberate on the case and later returned into court with the following verdict, viz: "In the District Court of the United States for the District of Nevada. The United States vs. E. Vachina. No. 5396. We, the jury in the [30] above-entitled cause, find the defendant guilty as charged in the indictment. Dated May 7th, 1921. G. B. Spradling, Foreman"—and so they all say. Thereupon the Court ordered the defendant to appear for sentence on Tuesday, the 17th instant, at ten o'clock A. M.

**Minutes of Court — May 13, 1921 — Order
Continuing Passing of Sentence.**

**INDICTMENT FOR VIOL. NATIONAL PRO-
HIBITION ACT.**

(No. 5396.)

THE UNITED STATES

vs.

E. VACHINA.

Upon motion of Mr. M. B. Moore, consented to by the U. S. Attorney, it is ordered that the passing

of sentence in this case be, and the same is hereby, continued until the 27th instant at ten o'clock A. M.

**Minutes of Court—May 27, 1921—Sentence and
Order Allowing Writ of Error.**

**INDICTMENT FOR VIOL. NATIONAL PRO-
HIBITION ACT.**

(No. 5396.)

THE UNITED STATES

vs.

E. VACHINA.

This being the time heretofore appointed for passing sentence in this case, Mr. Wm. Woodburn, U. S. Attorney, appeared on the part of the plaintiff; Mr. M. B. Moore, for defendant, who was also present. Mr. Moore presents his motion for a new trial, which was denied by the Court and an exception taken by counsel. Therefore the Court pronounced judgment as follows: **ORDERED** that the defendant pay to the United States a fine of Five Hundred Dollars [31] and that he stand committed to the care of the marshal until the fine and costs incurred herein are paid.

ORDER ALLOWING WRIT OF ERROR.

On this 27th day of May, A. D. 1921, came the defendant, E. Vachina, by his attorneys, Messrs. Moore & McIntosh, and filed herein and presented to the Court his petition praying for the allowance of a writ of error and assignment of errors intended to be used by him, praying also that a transcript of

the record, testimony, exhibits, stipulations, proceedings and papers, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit; and that such other and further proceedings may be had as may be proper in the premises. In consideration whereof, the Court allows a writ of error, upon the defendant, E. Vachina, giving a bond according to law in the sum of Two Thousand Dollars (\$2,000.00), which shall operate as a supersedeas bond, and that upon the accepting, filing and approval of said bond, the said defendant shall be and he is hereby ordered to be released from custody.

Minutes of Court—June 25, 1921—Order Extending Time to File Papers in U. S. C. C. A.

VIOLATION OF NATIONAL PROHIBITION ACT.

(No. 5396.)

THE UNITED STATES

vs.

E. VACHINA.

Good cause appearing therefor, it is ORDERED that the defendant herein be, and he is hereby, granted thirty days from and after this date within which to file his record on appeal in the United States Circuit Court of Appeals. [32]

In the District Court of the United States for the
District of Nevada.

May Term, 1921.

Honorable E. S. FARRINGTON, Judge.

**VIOLATION OF NATIONAL PROHIBITION
ACT.**

No. 5396.

UNITED STATES OF AMERICA

vs.

E. VACHINA.

Judgment.

This being the time heretofore appointed for passing sentence in this case, the Court pronounced judgment as follows, addressing the defendant:

You, E. Vachina, have been indicted by the Grand Jury, impaneled in and by this court, for the crime of violating the National Prohibition Act by having in your possession intoxicating liquors; said liquors containing one-half of one per centum, or more, of alcohol by volume, and being fit for use for beverage purposes; said crime having been committed on the 29th day of December, 1920, at Reno, Washoe County, State and District of Nevada, and within the jurisdiction of this court. You were duly arraigned upon that indictment, as required by law, and on being called upon to plead thereto you pleaded not guilty. At a subsequent day you were placed on trial, by a jury of your own selection, and

by the verdict of that jury you were found guilty as charged in the indictment.

The defendant was then asked if he had any legal cause to show why the judgment of the Court should not now be pronounced against him. To which he replied that he had not.

In consideration of the law and the premises, it is hereby **ORDERED AND ADJUDGED** that you pay to the United States a fine of Five Hundred (\$500.00) Dollars and costs, and that you stand committed to the care of the marshal until the said fine and costs, taxed at \$——, are paid.

Dated and entered, May 27, 1921.

Attest: E. O. PATTERSON,

Clerk. [33]

In the United States District Court for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. VACHINA,

Defendant.

Praeipce for Transcript of Record.

To E. O. Patterson, Clerk U. S. District Court,
Carson City, Nev.

We hearby request that you have prepared for us copies of the records in the case of the United States of America vs. E. Vachina, as follows:

1. Copies of proceedings before the United States Commissioner, Anna M. Warren, including:

- (a) Affidavit for search-warrant.
- (b) Search-warrant.
- (c) Notice of motion to quash search-warrant.
- (d) Motion to quash search-warrant.
- (e) Copy of all testimony taken before said Anna M. Warren, certified up to the District Court on said motion.
- (f) Copy of order of Commissioner ruling upon said motion.
- (g) Copy of any other papers or proceedings not included in the above had or taken before the said Commissioner.

2. Copy of motion made and filed in the United States District Court for the District of Nevada, renewing in said Court the motion made before the Commissioner.

- (a) Copy of notice of motion for the return of property taken under search-warrant.
[34]
- (b) Copy of motion for the return of property made and filed in said cause in said U. S. District Court.
- (c) Copy of minutes of clerk of court showing the Court's ruling upon all motions and objections.
- (d) Copy of indictment.
- (e) Complete transcript of testimony and notes taken by stenographer in said cause.
- (f) Copy of verdict of jury.
- (g) Copy of motion for new trial.
- (h) Copy of petition for writ of error.
- (i) Copy of order allowing writ of error.

- (j) Copy of assignment of errors.
- (k) Copy of citation.
- (l) Copy of supersedeas bond.
- (m) Copy of cost bond.

MOORE & McINTOSH,
Attorneys for Defendant.

[Endorsed]: No. 5396. In the United States District Court for the District of Nevada. United States of America, Plaintiff, vs. E. Vachina, Defendant. Praecipe. Filed June 11, 1921. E. O. Patterson, Clerk. Moore & McIntosh, Attorneys at Law, Reno, Nevada. [35]

In the District Court of the United States, in and
for the District of Nevada.

No. 5396.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. VACHINA,

Defendant.

Motion for New Trial.

Comes now the defendant named above and moves the Court that a new trial be granted for the following reasons, and on the following grounds, to wit:

1st. That the Court erred in its decision upon questions of law arising during the course of the trial.

2d. That the verdict of the jury is contrary to law.

MOORE & McINTOSH,
Attorneys for Defendant.

[Endorsed]: No. 5396. In the District Court of the United States in and for the District of Nevada. United States of America, Plaintiff, vs. E. Vachina, Defendant. Motion for New Trial. Filed May 27, 1921. E. O. Patterson, Clerk. Moore & McIntosh, Attorneys at Law, Reno, Nevada. [36]

In the United States District Court for the District of Nevada.

No. 5396.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
E. VACHINA,
Defendant.

Assignment of Errors.

Comes now the defendant above named, E. Vachina, and files the following assignment of errors upon which he will rely upon his prosecution of the writ of error in the above-entitled cause from the judgment made and entered by this Honorable Court on the 27th day of May, A. D. 1921.

I.

That the United States District Court for the District of Nevada erred in denying defendant's

motion for new trial made in the above-entitled court and cause on the 27th day of May, 1921, and before the judgment of sentence was pronounced.

II.

That the said Court erred in overruling defendant's objection to the introduction of testimony, made after the jury was impaneled and sworn to try said cause, and before any testimony as to the facts was introduced at said trial.

III.

That the said Court erred in overruling defendant's objection [37] to the admission of the testimony of the witness H. P. Brown, as to what he saw, found and did under the search-warrant referred to in the motion for the return of property made and filed in said cause before the date on which said cause came to trial, said testimony referred to, with questions and answers as follows, to wit:

Q. What, if anything, did you find, Mr. Brown?

Mr. MOORE.—I object to what this witness may have found, or what he saw, or what he did, in these premises at that time, basing my objection on the general grounds laid down in my first objection to the introduction of any testimony.

The COURT.—It will be the same ruling, and you may have the same exception.

Mr. DISKIN.—Proceed, Mr. Brown.

A. We found a demijohn containing what we

call claret wine, and a quart bottle called jack-ass brandy.

Q. And where did you find these two articles?

A. In the kitchen underneath the table.

Q. Where was the defendant?

A. The defendant was in the same room, putting a curtain up to the window.

Q. Was there any other person there outside of the defendant?

A. There was one person when we went in there, eating a sandwich.

Q. In the kitchen? A. Yes, sir.

Q. Do you know who it was?

A. It was a messenger-boy, I don't know his name.

Q. Describe the interior of that place, Mr. Brown. [38]

A. Well, there is a bar-room in front, then a dining-room, and then a kitchen, all straight ahead, all joined together.

Q. Do you know whether or not the public is served meals there? A. I do not know.

Q. Do you know whether or not Mr. Vachina lived there? A. No, I do not.

Q. This was a kitchen, was it?

A. Yes, sir.

Q. Did you see any other member of the household around there?

A. Not anyone, only out in the bar-room.

Q. What kind of a dining-room was this?

A. It is a very large dining-room, with

chairs, and a big, long table, appeared to be set with vinegar bottle, and such as that, in the center of the table, and sugar-bowl.

Q. Do you know whether it is a public or private dining-room?

A. I don't know; I never did see anyone eating in there; on my two occasions of visiting there I never did see anyone eating in that dining-room.

Q. And this kitchen you have described is right off the dining-room? A. Yes, sir.

Q. What did you do with the articles that you found there, Mr. Brown?

A. Took them up to the office of the chief of police, and sealed them up, and then handed them over to the chemist.

Q. Did you take them from the defendant's possession at that time? A. Yes, sir.

Q. Will you examine this bottle and its contents? (Hands to witness.)

A. That is the label that I put on that bottle.

Q. Is that the bottle which you obtained from the possession of the defendant?

A. Yes, sir. [39]

Q. How much liquid was in that bottle at that time?

A. Oh, probably a couple more inches than what is in it now.

Q. How much would you say is in it now?

A. Half full.

Q. Did you make any examination of it at that time?

A. I didn't, no, just smelled it, that is all, at the time I found it.

Q. Now, you say you found what you thought was claret wine? A. Yes, sir.

Q. Will you examine this demijohn, please. (Hands to witness.)

A. That is the demijohn that I found underneath the table.

Q. Was there any substance or liquid in it at that time? A. Yes, sir.

Q. Did you make an examination of it?

A. Just by smelling, is all.

Q. What did you determine?

A. Claret wine, I should say it was.

Q. And both of these containers were turned over by you to Professor Dinsmore?

A. Yes, sir.

Q. Were they in your custody from the time you seized them until you turned them over to Professor Dinsmore? A. Yes.

Q. Did you do anything to the substance contained in these two containers?

A. I did not.

Mr. DISKIN.—We offer in evidence the bottle and its contents and the demijohn and its contents.

Mr. MOORE.—We object, if the Court please, on the grounds heretofore stated.

The COURT.—It will be the same ruling

and the same exception. (The bottle is marked Plaintiff's Exhibit No. 1 and the demijohn, [40] Plaintiff's Exhibit No. 2.)

Mr. DISKIN.—(Q.) What you have testified occurred where, Mr. Brown?

A. Occurred in Reno, Washoe County, Nevada.

Mr. DISKIN.—Cross-examine.

IV.

That the said Court erred in overruling defendant's objection to the testimony of P. Nash as to what he saw, found and did under the search-warrant referred to in the motion for the return of property made and filed in said cause before the date on which the said cause came to trial, said testimony referred to with questions and answers, as follows:

Q. What was the defendant doing—you mean Vachina?

Mr. MOORE.—I object to any testimony as to what the defendant was doing, or what this witness saw or did at that time, basing my objection on the grounds heretofore stated.

The COURT.—Same ruling and exception.

WITNESS.—The defendant was in the act—had his back turned to us—was in the act of raising a shade, or putting a shade up on the back window, some sort of a covering for the back window, and he didn't know we were in the building at all, I do not believe, until I touched him on the leg, I think it was, or some

part of his body, and told him we had a warrant to make a search.

Mr. DISKIN.—(Q.) What did you do thereafter?

A. Took him across to the police station.

Q. What did you do in the building—did you look for anything more in the building?

A. Didn't look for any more than we found.

Q. I am trying to find out what you found.

A. Oh, yes. I had turned around, and the defendant had [41] turned around, and Mr. Brown had these two containers of what proved to be liquor in one and wine in the other.

Q. Where were they found?

A. Underneath this center table—I guess you would call it a center table; it had a rack on it, a long table in the center of the kitchen.

Q. Did you make any examination of the contents of the bottle at that time?

A. Yes, sir.

Q. What examination did you make?

A. I tasted it.

Q. Are you familiar with the taste of alcohol? A. Yes, sir.

Q. Can you say that the bottle contained alcohol?

A. I can. I would call it jackass brandy.

Q. How about the demijohn?

A. The demijohn had a good deal of wine, some sort of red wine in it.

Q. Will you describe the interior of the place to the Court and jury?

A. Entering from Center Street you come into the bar-room proper; there is a little office directly next to the Center Street end of the bar, but the doorway is to the right of the office going in; you pass through this bar-room, which is a long room with tables and chairs, then you go into a room which I presume had been a dining room; at this time it was empty.

Q. Empty?

A. Yes, sir. I think there were tables there, but I didn't see any dishes or signs of being a dining-room, but from its appearance, I judge if this had been a restaurant this would have been the dining-room of the property; pass through it and into the kitchen, as I remember.
[42]

Q. Was the kitchen furnished?

A. Yes, sir; it had a stove in it.

Q. Anything else?

A. Chairs, sink, table; I didn't notice any supplies of any kind; we didn't make any search to speak of at this time. My recollection is I saw some dishes there too.

Mr. DISKIN.—Cross-examine.

V.

That the said Court erred in overruling the motion of defendant to strike the testimony from the record of the witness Brown and Nash, said motion being as follows, to wit:

Mr. MOORE.—Now, if the Court please, I move the Court to strike from the record the testimony of Mr. Nash and of Mr. Brown rela-

tive to what they did on the evening as detailed by them; also all evidence as to what they found on that evening in the premises described by them, for the reason and on the grounds that it now appears from their testimony and the records of this court, that they were operating under a search-warrant which was invalid, it having been issued upon an affidavit, which affidavit was insufficient, and that their actions thereunder were in violation of the constitutional rights of the defendant, as provided by the Fourth Amendment of the Constitution; and that the introduction of such testimony is in violation of the Constitutional rights of the defendant as provided under the Fifth Amendment to the Constitution.

The COURT.—It will be the same ruling and the same exception.

VI.

That the said Court erred in overruling the objection of [43] the defendant to the question propounded to the witness S. C. Dinsmore, which question is as follows:

Q. What did your examination disclose as to the alcoholic contents of the same?

VII.

That the said Court erred in overruling defendant's motion made in said cause in which the defendant renewed the motion made before the Commissioner, Anna M. Warren, to quash, set aside and hold for naught the search-warrant issued by Anna

M. Warren on the 28th day of December, A. D. 1920.

VIII.

That the said Court erred in overruling and denying defendant's motion made in this cause to quash the search-warrant issued by Anna M. Warren, a United States Commissioner in and for the District of Nevada, on the 28th day of December, 1920, and for the return to the defendant of the property taken under said search-warrant.

BY REASON WHEREOF, plaintiff in error prays that the judgment aforesaid be reversed and the cause remanded to the trial court with instructions to the trial court to quash the search-warrant in said action, and for such other and further proceedings as may be proper in the premises.

Respectfully submitted.

MOORE & McINTOSH,
Attorneys for Defendant.

[Endorsed]: No. 5396. In the United States District Court for the District of Nevada. United States of America, Plaintiff, vs. E. Vachina, Defendant. Assignment of Errors. Filed May 27th, 1921. E. O. Patterson, Clerk. Moore & McIntosh, Attorneys at Law, Reno, Nevada. [44]

In the United States District Court for the District
of Nevada.

No. 5396.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. VACHINA,

Defendant.

Petition for Writ of Error.

To the Honorable E. S. FARRINGTON, Judge of
the District Court of the United States, for
the District of Nevada.

Now comes E. Vachina, the defendant in the
above-entitled cause, and feeling himself aggrieved
by the verdict of the jury and the judgment of the
District Court of the United States for the District
of Nevada, made and entered on the 27th day of
May, A. D. 1921, hereby petitions for an order
allowing him, said defendant, to prosecute a writ
of error to the United States Circuit Court of Ap-
peals of the Ninth Circuit from the District Court
of the United States for the District of Nevada,
and also prays the court that a transcript of the
record, testimony, exhibits, stipulation, proceedings
and papers, duly authenticated, may be prepared
and sent to the United States Circuit Court of Ap-
peals for the Ninth Circuit, and that said writ of
error may be made a supersedeas and that your
petitioner be released on bail in an amount to be

fixed by the Judge of said District Court pending the final disposition of said writ of error. [45]

Assignment of errors is filed with this petition.

E. VACHINI.

MOORE & McINTOSH,

His Attorneys.

[Endorsed]: No. 5396. In the United States District Court for the District of Nevada. United States of America, Plaintiff, vs. E. Vachina, Defendant. Petition for Writ of Error. Filed May 27th, 1921. E. O. Patterson, Clerk. Moore & McIntosh, Attorneys at Law, Reno, Nevada. [46]

In the United States District Court for the District of Nevada.

No. 5396.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. VACHINA,

Defendant.

Order Allowing Writ of Error.

On this 27th day of May, A. D. 1921, came the defendant, E. Vachina, by his attorneys, Messrs. Moore & McIntosh, and filed herein and presented to the Court his petition praying for the allowance of a writ of error and assignment of errors intended to be used by him, praying also that a transcript of the record, testimony, exhibits, stipula-

tions, proceedings and papers, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit; and that such other and further proceedings may be had as may be proper in the premises.

IN CONSIDERATION WHEREOF, the Court allows a writ of error, upon the defendant, E. Vachina, giving a bond according to law in the sum of Two Thousand Dollars (\$2,000.00), which shall operate as a supersedeas bond, and that upon the accepting, filing and approval of said bond, the said defendant shall be and he is hereby ordered to be released from custody.

Done in open court this 27th day of May, A. D. 1921.

E. S. FARRINGTON,
District Judge. [47]

[Endorsed]: No. 5396. In the United States District Court for the District of Nevada. United States of America, Plaintiff, vs. E. Vachina, Defendant. Order Allowing Writ of Error. Filed May 27th, 1921. E. O. Patterson, Clerk. Moore & McIntosh, Attorneys at Law, Reno, Nevada. [48]

In the United States District Court for the District
of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. VACHINA,

Defendant.

Bail Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That I, E. Vachina, of the County of Washoe, State of Nevada, as principal, and Joseph Pincolini and Dante Pincolini, of the County of Washoe, State of Nevada, as sureties, are held and firmly bound unto the United States of America, in the full and just sum of Two Thousand Dollars (\$2,000.00) to be paid to the United States of America, to which payment well and truly made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

SEALED with our seals and dated this 27th day of May, in the year of our Lord one thousand nine hundred and twenty-one.

WHEREAS, lately on the 27th day of May, A. D. 1921, at a term of the District Court of the United States for the District of Nevada, in a cause pending in said court between the United States of America, plaintiff, and E. Vachina, defendant, a judgment and sentence was rendered against said defendant as follows, to wit:

The said E. Vachina to be fined in the sum of Five Hundred [49] Dollars (\$500.00) together with costs of suit.

WHEREAS the said E. Vachina obtained a Writ of Error from the United States Circuit Court of Appeals for the Ninth Circuit of the said United States District Court for the District of Nevada, to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing the United

States of America to be and appear in the said court 30 days from and after the date thereof, which citation has been fully served.

Now, the condition of said obligation is such, that if the said E. Vachina shall prosecute said writ of error to effect, and shall appear in person in the United States Circuit Court of Appeals for the Ninth Circuit, when said cause is reached for argument or when required by law or rule of said court, and from day to day thereafter in said court until such cause shall be finally disposed of, and shall abide by and obey the judgment and all orders made by the said Court of Appeals, in said cause, and shall surrender himself in execution of the judgment and sentence appealed from, as said Court may direct, if the judgment and sentence against him shall be affirmed, and if he shall appear for trial in the District Court of the United States for the District of Nevada, on such day or days as may be appointed for a retrial by said District Court and abide by and obey all orders of said court, provided the judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals, then the above obligation to be [50] void; otherwise to remain in full force, virtue and effect.

ED. VACHINA, (Seal)
Principal.

JOSEPH PINCOLINI, (Seal)
Surety.

DANTE PINCOLINI, (Seal)
Surety.

State of Nevada,
County of Washoe,—ss.

Joseph Pincolini and Dante Pincolini, sureties on the annexed foregoing undertaking, being first duly sworn, each for himself and not one for the other deposes and says: That he is a resident and freeholder within the County of Washoe, State of Nevada; and that he is worth the sum of Two Thousand Dollars (\$2000.00) over and above all his just debts and liabilities, in property not exempt from execution.

JOSEPH PINCOLINI.
DANTE PINCOLINI.

Subscribed and sworn to before me this 27th day of May, 1921.

[Seal] ANNA M. WARREN,
United States Commissioner for the District of Nevada.

[Endorsed]: No. 5396. In the United States District Court for the District of Nevada. United States of America, Plaintiff, vs. E. Vachina, Defendant. Bail Bond on Writ of Error. Filed May 31, 1921. T. O. Patterson, Clerk. Approved 5/27/21. Wm. Woodburn, U. S. Attorney. Approved 5/31, 1921. E. S. Farrington. Moore & McIntosh, Attorneys at Law, Reno, Nevada. [51]

In the United States District Court for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. VACHINA,

Defendant.

Bond on Writ of Error.

WHEREAS the defendant in the above-entitled action has sued out a writ of error through the United States Circuit Court of Appeals of the Ninth Circuit to the said United States District Court for the District of Nevada, from a judgment made and entered against him in said above-entitled cause in said United States District Court for the District of Nevada on the 27th day of May, A. D. 1921, or thereabouts; and

WHEREAS the said defendant by an order of Court heretofore duly made and entered is required to enter into a bond in the sum of Five Hundred Dollars (\$500.00) to guarantee the payment of all costs in said cause;

NOW, THEREFORE, in consideration of the premises and of the suing out of said writ of error to the said Court of Appeals for the Ninth District of the United States, we, the undersigned, residents of the county of Washoe, State of Nevada, do hereby jointly and severally undertake and promise on the part of the said E. Vachina, that the said

person will pay all damages and costs which may be awarded against him on account of the said [52] writ of error or on the dismissal thereof, not exceeding the sum of Five Hundred Dollars (\$500.00), in which amount we acknowledge ourselves jointly and severally bound.

WITNESS our signature this — day of June, A. D. 1921.

JOSEPH PINCOLINI.

E. PINCOLINI.

State of Nevada,
County of Washoe,—ss.

Joseph Picolini and E. Picolini, each for himself and not one for the other, being first duly sworn, deposes and says: That he is a resident and householder of the County of Washoe, State of Nevada, and is the same identical person who signed the above and foregoing bond and undertaking; and that he is worth the sum of One Thousand Dollars (\$1000.00) over and above all indebtedness and in property subject to execution.

JOSEPH PINCOLINI.

E. PINCOLINI.

Subscribed and sworn to before me this 17th day of June, A. D. 1921.

[Seal]

M. B. MOORE,

Notary Public in and for Washoe County, State of Nevada.

My commission expires April 23, 1923.

[Endorsed]: No. 5396. In the United States District Court for the District of Nevada. United States of America, Plaintiff, vs. E. Vachina, Defendant. Bond. Within undertaking approved June 21, 1921. E. S. Farrington, Dist. Judge. Filed June 21, 1921. E. O. Patterson, Clerk. Moore & McIntosh, Attorneys at Law, Reno, Nevada. [53]

In the District Court of the United States, in and
for the District of Nevada.

No. 5396.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. VACHINA,

Defendant.

Testimony.

This case came on for trial in the above-entitled court on Saturday, May 7th, 1921, at 1:30 o'clock P. M. of said day, before the Honorable E. S. Farrington, Judge of said court, and a jury, a jury having been duly and regularly impaneled and sworn to try said case;

Mr. M. A. Diskin, Assistant United States Attorney, appearing as attorney for plaintiff, and

Messrs. Moore & McIntosh appearing as attorneys for defendant.

Whereupon, after the reading of the indictment

by the Clerk, the following proceedings were had and testimony introduced: [54]

Mr. MOORE.—If the Court please, I object to the introduction of any testimony in this case which goes to what the officers found and what they did under a certain search-warrant issued out of the Commissioner's court, which is a part of the files and records in this case, on the 28th day of December, 1920, and anything that they did or saw in the premises described in that search-warrant, or any testimony as to what was seized, if anything, there by the officer serving the same, on the grounds that the search-warrant was insufficient and void, for the reason that no proper and sufficient affidavit had been made or filed before the Commissioner, nor was any other sufficient testimony taken to warrant the issuance of the search-warrant under which the officers operated, or to show that probable cause existed that there was an offense being committed there in violation of the Prohibition Act, or any other law of the United States; or that this defendant had or was committing any offense, on the grounds that the search and seizure was in violation of his constitutional rights, as provided under the Fourth Amendment to the Constitution of the United States; and that the use and introduction of any testimony so secured would be in violation of his constitutional right, as provided in the Fifth Amendment of the Constitution of the United States; basing the objection on the proceedings heretofore had, and the files in this case.

The COURT.—The objection will be overruled.

Mr. MOORE.—Give us the benefit of an exception.

The COURT.—The exception will be noted. [55]

Testimony of H. P. Brown, for the Government.

H. P. BROWN, called as a witness on behalf of the Government, after being sworn, testified as follows:

Direct Examination by Mr. DISKIN.

Q. Your name is H. P. Brown?

A. Yes, sir.

Q. You are a prohibition enforcement agent?

A. Yes, sir.

Q. And were you such officer on the 29th of December, 1920? A. Yes, sir.

Q. Do you know the defendant in this case, E. Vachina? A. I do.

Q. Do you know where his place of business was on the 29th of December, 1920? A. Yes, sir.

Q. Where was it?

A. Reno, Nevada; the name of the place was the Alpine Winery.

Q. Did you have occasion to enter the premises of the Alpine Winery kept by the defendant on the 29th of December, 1920? A. I did.

Q. Who was with you at the time?

A. Mr. Nash and Mr. Sheehan.

Q. How did you enter the place, by what way?

A. We entered from the back way.

(Testimony of H. P. Brown.)

Q. What, if anything, did you find, Mr. Brown?

Mr. MOORE.—I object to what this witness may have found, or what he saw, or what he did, in these premises at that time, basing my objection on the general grounds laid down in my first objection to the introduction of any testimony.

The COURT.—It will be the same ruling, and you may have the same exception.

Mr. DISKIN.—Proceed, Mr. Brown. [56]

A. We found a demijohn containing what we call claret wine, and a quart bottle called jackass brandy.

Q. And where did you find these two articles?

A. In the kitchen underneath the table.

Q. Where was the defendant?

A. The defendant was in the same room, putting a curtain up to the window.

Q. Was there any other person there outside of the defendant?

A. There was one person when we went in there, eating a sandwich.

Q. In the kitchen? A. Yes, sir.

Q. Do you know who it was?

A. It was a messenger-boy, I don't know his name.

Q. Describe the interior of that place, Mr. Brown.

A. Well, there is a bar-room in front, then a dining-room, and then a kitchen, all straight ahead, all joined together.

Q. Do you know whether or not the public is

(Testimony of H. P. Brown.)

served meals there? A. I do not know.

Q. Do you know whether or not Mr. Vachina lived there? A. No, I do not.

Q. This was a kitchen, was it? A. Yes, sir.

Q. Did you see any other member of the household around there?

A. Not any one, only out in the bar-room.

Q. What kind of a dining-room was this?

A. It is a very large dining-room, with chairs, and a big, long table appeared to be set with vinegar bottle, and such as that, in the center of the table, and sugar-bowl.

Q. Do you know whether it is a public or private dining-room? [57]

A. I don't know; I never did see anyone eating in there; on my two occasions of visiting there I never did see anyone eating in that dining-room.

Q. And this kitchen you have described is right off the dining-room? A. Yes, sir.

Q. What did you do with the articles that you found there, Mr. Brown?

A. Took them up to the office of the chief of police, and sealed them up, and then handed them over to the chemist.

Q. Did you take them from the defendant's possession at that time? A. Yes, sir.

Q. Will you examine this bottle and its contents. (Hands to witness).

A. That is the label that I put on that bottle.

Q. Is that the bottle which you obtained from

(Testimony of H. P. Brown.)

the possession of the defendant? A. Yes, sir.

Q. How much liquid was in that bottle at that time?

A. Oh, probably a couple more inches than what is in it now.

Q. How much more would you say is in it now?

A. Half full.

Q. Did you make any examination of it at that time?

A. I didn't, no; just smelled it, that is all, at the time I found it.

Q. Now, you say you found what you thought was claret wine? A. Yes, sir.

Q. Will you examine this demijohn, please?
(Hands to witness.)

A. That is the demijohn that I found underneath the table.

Q. Was there any substance or liquid in it at that time? A. Yes, sir.

Q. Did you make an examination of it?

A. Just by smelling, is all.

Q. What did you determine? [58]

A. Claret wine, I should say it was.

Q. And both of these containers were turned over by you to Professor Dinsmore? A. Yes, sir.

Q. Were they in your custody from the time you seized them until you turned them over to Professor Dinsmore? A. Yes.

Q. Did you do anything to the substance contained in these two containers? A. I did not.

(Testimony of H. P. Brown.)

Mr. DISKIN.—We offer in evidence the bottle and its contents and the demijohn and its contents.

Mr. MOORE.—We object, if the Court please, on the grounds heretofore stated.

The COURT.—It will be the same ruling and same exception.

(The bottle is marked Plaintiff's Exhibit No. 1 and the demijohn, Plaintiff's Exhibit No. 2.)

Mr. DISKIN.—(Q.) What you have testified occurred where, Mr. Brown?

A. Occurred in Reno, Washoe County, Nevada.

Mr. DISKIN.—Cross-examine.

Cross-examination.

Mr. MOORE.—(Q.) What time in the day was it when you went there, Mr. Brown?

A. Seven o'clock in the evening.

Q. Was it dark at that time?

A. Yes, just getting dark.

Q. The 29th of December, it was after dark, was it not? A. Yes, just dark.

Q. Did you all go in the premises together?

A. Yes, sir.

Q. You and Mr. Nash and Mr. Sheehan?

A. Yes.

Q. All three of you Federal prohibition officers?

A. Yes, sir.

Q. Did you have a search-warrant with you at the time? [59] A. Mr. Nash did.

Q. You knew that fact? A. Yes, sir.

(Testimony of H. P. Brown.)

Q. Had you seen it? A. Yes, sir.

Q. And that was the only one that was in the party? A. Yes, sir.

Q. Now, how many rooms are there in that building there? A. In the whole building?

Q. No, on the ground floor, commencing with the front room that you say had a bar in it.

A. All I can testify is as to the bar-room, the dining-room and the kitchen.

Q. Isn't there a small room between the dining-room and the kitchen? A. A what?

Q. A small room; don't you go through two doors, that is, openings, from the dining-room, in going into the kitchen? Just to revive your recollection, when you come in from the dining-room toward the kitchen, don't you pass through a door, and then turn off to the left, and go through another doorway?

A. I believe there is a little hallway, a hallway that leads out to the doorway, to the door that we entered in the back of the premises.

Q. Now, you didn't see anyone in there before you entered the place, did you? A. No, sir.

Q. Nor see anything that was in there until after you entered the kitchen? A. No, sir.

Q. The kitchen had a stove in it? A. Yes, sir.

Q. And working boards and dishes, and general kitchen furniture, did it not? A. Yes.

Q. Whereabouts was it that you found the two

(Testimony of H. P. Brown.)

exhibits that have [60] been presented here, the bottle and the other container?

A. A table about the center of the kitchen, underneath the table.

Q. And these were standing underneath the table? A. Yes, sir.

Q. Where was the defendant?

A. The defendant was—like the table was sitting in the center of the room there, and the window was up here (indicating), he was up there putting a curtain up, standing on another table putting a curtain up at this window.

Q. When you entered there what did you do immediately?

A. We came in there, and as our warrant stated the goods would be found in the kitchen underneath the table, that would be my first place to look.

Q. You say your warrant stated that?

A. I think it did, underneath the table in the kitchen.

Q. Will you examine the warrant, and see if you find any such statement?

A. The affidavit, I think. Let me see the affidavit. (Examines affidavit.) Yes, it mentions the kitchen, that it was sold in the kitchen.

Q. Yes, but the affidavit itself does not mention where it could be found in the kitchen.

A. Oh, no, I said where it was sold.

Q. And when you went in the kitchen and saw

(Testimony of H. P. Brown.)

the defendant up at the window, what did you immediately do?

A. Mr. Nash immediately touched him on the leg, and informed him that he had a search-warrant.

Q. That he had a search-warrant?

A. When Mr. Nash said that I took the stuff from underneath the table.

Q. You were around at the other corner of the table by that time? [61]

A. I was there, when I first entered I stopped at the table.

Q. Is it not a fact you went around there and picked up the stuff before Mr. Nash had approached the defendant?

A. No, sir. No, sir, I looked under the table, but I didn't pick it up; I knew it was under the table before Mr. Nash served the warrant.

Q. How did you know it was there?

A. I saw it.

Q. You saw the bottle?

A. No, I stooped down and saw it underneath there.

Q. You could not tell what was in it, could you?

A. No, sir, I could not.

Mr. MOORE.—I think that is all.

Mr. DISKIN.—That is all, Mr. Brown.

Testimony of P. Nash, for the Government.

P. NASH, called as a witness on behalf of the Government, after being sworn, testified as follows:

Direct Examination by Mr. DISKIN.

Q. Mr. Nash, do you know the defendant in this case? A. I do.

Q. Do you know what business he was engaged in on the 29th of December of last year?

A. Soft drink.

Q. Where was his establishment?

A. Alpine Winery, directly across Center Street from the City Hall.

Q. Did you have occasion to enter his premises on the 29th of December, 1920? A. I did. [62]

Q. Who was with you?

A. Mr. Brown and Mr. Sheehan, both agents.

Q. Through what door did you enter?

A. We went in through the back door, entered into a little passageway, and turned to the right as we came in in this passageway, which brought us into either the dining-room, I think it was the dining-room, but close to the kitchen, then we went right through the next door into the kitchen, and the defendant was in there.

Q. What was the defendant doing—you mean Vachina?

Mr. MOORE.—I object to any testimony as to what the defendant was doing, or what this witness saw or did at that time, basing my objection on the grounds heretofore stated.

(Testimony of P. Nash.)

The COURT.—Same ruling and exception.

WITNESS.—The defendant was in the act—had his back turned to us—was in the act of raising a shade, or putting a shade up on the back window, some sort of a covering for the back window, and he didn't know we were in the building at all, I do not believe, until I touched him on the leg, I think it was, or some part of his body, and told him we had a warrant to make a search.

Mr. DISKIN.—(Q.) What did you do thereafter?

A. Took him across to the police station.

Q. What did you do in the building—did you look for anything more in the building?

A. Didn't look for any more than we found.

Q. I am trying to find out what you found.

A. Oh, yes. I had turned around, and the defendant had turned around, and Mr. Brown had these two containers of what proved to be liquor in one and wine in the other.

Q. Where were they found? [63]

A. Underneath this center table, I guess you would call it a center table; it had a rack on it, a long table in the center of the kitchen.

Q. Did you make any examination of the contents of the bottle at that time? A. Yes, sir.

Q. What examination did you make?

A. I tasted it.

Q. Are you familiar with the taste of alcohol?

A. Yes, sir.

Q. Can you say that the bottle contained alcohol?

A. I can. I would call it jackass brandy.

(Testimony of P. Nash.)

Q. How about the demijohn?

A. The demijohn had a good deal of wine, some sort of red wine in it.

Q. Will you describe the interior of the place to the Court and jury?

A. Entering from Center Street you come into the bar-room proper; there is a little office directly next to the Center Street end of the bar, but the doorway is to the right of the office going in; you pass through this bar-room, which is a long room with tables and chairs, then you go into a room which I presume had been a dining-room; at this time it was empty.

Q. Empty?

A. Yes, sir. I think there were tables there, but I didn't see any dishes or signs of being a dining-room, but from its appearance, I judge if this had been a restaurant this would have been the dining-room of the property; pass through it and into the kitchen, as I remember.

Q. Was the kitchen furnished?

A. Yes, sir, it had a stove in it.

Q. Anything else?

A. Chairs, sink, table; I didn't notice any supplies of any kind; we didn't make any search to speak of [64] at this time. My recollection is I saw some dishes there too.

Mr. DISKIN.—Cross-examine.

Cross-examination.

Mr. MOORE.—(Q.) You and all the party with you were Federal prohibition officers?

A. Yes, sir.

(Testimony of P. Nash.)

Q. And you were operating under the search-warrant which has been introduced in evidence here, were you?

Mr. DISKIN.—I don't know that it has been introduced in evidence.

Mr. MOORE.—Not introduced in evidence, no. It is in this case, I will show it to you. (Hands paper to witness.)

Mr. DISKIN.—We object to that, if your Honor please, as immaterial. I don't see the purpose of it. It has been determined it is a valid search-warrant.

The COURT.—I will sustain the objection.

Mr. MOORE.—We reserve an exception, if the Court please. There has been no answer. This search-warrant has not been introduced in evidence, but is a part of the records in this case. I think the question was objectionable, and if the Court will permit me I would like to ask another question.

The COURT.—Go on and ask what further questions you wish.

Mr. MOORE.—(Q.) I show you a document to which your name is attached, and has on the back of it, Reno, Nevada, December 30th, 1920, with a statement of what had been done over your name, having been issued, as it appears, on the 28th day of December, A. D. 1920. I will ask you to state if you had that document in your possession at the time you went there and entered the premises?

(Testimony of P. Nash.)

Mr. DISKIN.—That is objected to for the reason it is immaterial, not cross-examination, and cannot possibly determine any of the issues in this case.

Mr. MOORE.—I will state, if the Court please, that the question is propounded, as I take it, under the authority of the United States versus Amos, to which I have referred your Honor heretofore.

Mr. DISKIN.—I don't see how it is cross-examination.

The COURT.—It is not cross-examination. You can make him later your own witness.

Mr. MOORE.—Well, I will accept the ruling of the Court.

The COURT.—I will rule against it now on the ground it is not cross-examination. That is the only ground on which it is excluded at this time.

Mr. MOORE.—We reserve an exception, if the Court please.

Q. I believe you stated in your direct examination that when you entered the premises on that evening that the defendant—

The COURT.—Didn't he speak about that search-warrant on the direct examination?

Mr. DISKIN.—I think he did.

The COURT.—I will change that ruling. I withdraw that last ruling.

Mr. MOORE.—(Q.) Then I will ask you if that was the instrument you had in your possession on that night.

A. This document that is attached to these other two papers is the warrant.

(Testimony of P. Nash.)

Q. That is the warrant which you had? Did you have any other or different warrant than the one which you now hold in your hand and described as I have described it? [66]

A. I had a copy of this warrant; that is, I had the original and the copy.

Q. That is the original, is it not?

A. Judging from the looks of it, I should say it is a carbon copy, but it is apparently the one I used and retained as the original.

Q. It is the one upon which you made your return?

A. It is the one upon which I made my return.

Q. And which you treated as the original?

A. I did.

Q. What became of the copy?

A. Gave it to Vachina.

Q. And that is the only one which you had with you? A. At that time.

Q. Well, it was the only one under which you were acting at that time? A. Yes.

Q. Could you see from the outside of the building any of the things which you have described here?

A. Not from the outside of the building; no, sir.

Q. And you could not see them until you entered the kitchen? A. No.

Q. Could not see the demijohn or the bottle either?

A. No.

Mr. DISKIN.—That is objected to as not proper cross-examination and immaterial, not tending to prove any issue in this case. It is not insisted that

(Testimony of P. Nash.)

the officer went in there because he saw a crime committed, but because he was armed with a valid search-warrant.

The COURT.—Well, the answer is in, I will let it stand.

Mr. MOORE.—(Q.) What time of the evening was it when you went in there? A. Seven P. M.

[67]

Q. Dark at that time?

A. Well, I guess it was coming dark.

Q. 30th of December?

A. Yes; the street lights were on, as I remember.

Mr. MOORE.—I think that is all.

Mr. DISKIN.—That is all, Mr. Nash.

Mr. MOORE.—Now, if the Court please, I move the Court to strike from the record the testimony of Mr. Nash and of Mr. Brown relative to what they did on the evening as detailed by them; also all evidence as to what they found on that evening in the premises described by them, for the reason and on the grounds that it now appears from their testimony and the records of this court, that they were operating under a search-warrant which was invalid, it having been issued upon an affidavit, which affidavit was insufficient, and that their actions thereunder were in violation of the constitutional rights of the defendant, as provided by the Fourth Amendment of the Constitution; and that the introduction of such testimony is in violation of the constitutional rights of the defendant as provided un-

(Testimony of S. C. Dinsmore.)

der the Fifth Amendment to the Constitution.

The COURT.—It will be the same ruling and the same exception. [68]

Testimony of S. C. Dinsmore, for the Government.

S. C. DINSMORE, called as a witness on behalf of the Government, after being sworn, testified as follows:

Direct Examination by Mr. DISKIN.

Mr. DISKIN.—You admit the Professor's qualifications?

Mr. MOORE.—Oh, yes.

Mr. DISKIN.—(Q.) I hand you Plaintiff's Exhibit Number One; will you examine the same. (Hands to witness.) Can you identify that exhibit?

A. Yes, sir.

Q. When did you first see it?

A. I saw it on the evening of the 29th of December.

Q. Last year? A. Last year.

Q. In whose possession was it when you first saw it? A. Mr. Brown's.

Q. Did Mr. Brown at that time deliver it to you?

A. He did.

Q. Did you thereafter examine the contents of that bottle? A. I did.

Q. What did your examination disclose as to the alcoholic content of the same?

Mr. MOORE.—If the Court please, we object to the question on the grounds heretofore stated to the other question.

(Testimony of S. C. Dinsmore.)

The COURT.—The same ruling and exception.

Mr. MOORE.—And that it is incompetent, irrelevant and immaterial.

A. It showed an alcoholic content of 47.72 per cent.

Mr. DISKIN.—(Q.) From your analysis are you able to state whether or not the content of the bottle is fit for use as a beverage?

A. I would say that it was. [69]

Q. Will you examine this demijohn marked Plaintiff's Exhibit 2, did you ever see that demijohn before? A. Yes, sir.

Q. When did you see it first?

A. At the same time that this Exhibit Number One was delivered to me.

Q. From whom did you receive that Exhibit Number Two? A. Mr. Brown.

Q. At the same time? A. At the same time.

Q. Did you make any examination of the content of Exhibit Two? A. I did.

Q. What kind of an examination did you make, Professor?

A. I made determination for percentage of alcohol.

Q. And what did your examination disclose?

A. It showed it carried alcohol of 12.4 per cent.

Q. From the examination and analysis you made, can you state whether or not the content of the demijohn is fit for use as a beverage? A. It was.

Mr. DISKIN.—That is all.

Mr. MOORE.—No questions.

Mr. DISKIN.—That is our case.

Mr. MOORE.—That is our case. [70]

After argument to the jury by counsel for the Government, the Court instructs the jury as follows:

Instructions of Court to the Jury.

The COURT.—Gentlemen, I do not think it is necessary for me to say anything; still in every case of this sort the defendant has certain rights which ought to be mentioned.

The only charge is that the defendant had intoxicating liquor in his possession at the time alleged in the indictment. If that liquor was fit for a beverage, and contained one-half of one per cent, or more, of alcohol by volume, it was the sort of liquid which is prohibited by the statute, and the possession of which is made an offense. The statute declares that it is a violation of the law, and it is unlawful for one to have in his possession intoxicating liquor containing one-half of one per centum, or more, of alcohol by volume, and suitable for a beverage.

There is a provision in the statute to the effect that one may have in his possession in his dwelling-house for his own use and the use of his family, and for the use of his bona fide guests, intoxicating liquor, provided he acquired it lawfully. If he acquired the liquor and had it in his house at the time or prior to the time when the Volstead Act went into effect, then his possession would not be unlawful under the statute. But a possession in a bar-room or a hotel is not in a private dwelling-house,

and therefore is forbidden by the statute. The burden is on the defendant to show that the liquor was acquired by him lawfully, and if he fails to do so, the law presumes that it is an unlawful holding. When the possession of the liquor [71] is once shown, the law also presumes that it is for the purpose of barter and sale, unless the contrary is shown by the defendant, though the presumption is only a *prima facie* presumption, and may be overthrown by testimony on the part of the defendant.

The fact that the defendant has not testified here cannot be thrown in the balance against him. He is entitled under the law to wait until his guilt is proven beyond a reasonable doubt before he appears upon the stand; and his guilt must be shown beyond a reasonable doubt before you can find a verdict of guilty. A reasonable doubt is a substantial doubt; it must be such a doubt as would govern you in the more weighty affairs of life.

It takes twelve of your number to find a verdict. When you have agreed upon a verdict, you will notify the marshal and you will be brought into court. Is there anything further, Gentlemen?

Mr. MOORE.—Nothing further. [72]

**Certificate of Reporter U. S. District Court to
Transcript of Testimony and Proceedings.**

I, A. F. Torreyson, Reporter in the United States District Court for the District of Nevada, DO
HEREBY CERTIFY:

That as such reporter I took *verbatim* shorthand notes of the testimony and proceedings in said

court on the trial of the case of United States of America, Plaintiff, vs. E. Vachina, Defendant, on May 7th, 1921 and that the foregoing pages from 1 to 19, both inclusive, contain a full, true and correct transcript of my shorthand notes of the testimony given and proceedings had on said trial.

Dated May 23d, 1921.

A. F. TORREYSON.

[Endorsed]: In the District Court of the United States, in and for the District of Nevada. Honorable E. S. Farrington, Judge. United States of America, Plaintiff, vs. E. Vachina, Defendant. No. 5396. Transcript of Testimony. Appearances: Mr. M. A. Diskin, Assistant United States Attorney, for Plaintiff. Messrs. Moore & McIntosh, for Defendant.

WITNESSES:

	Direct	Cross
Brown, H. P.	3	6
Nash, P.	9	12
Dinsmore, S. C.	16	

Filed May 24, 1921. E. O. Patterson, Clerk.

[73]

In the District Court of the United States for the District of Nevada.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Nevada,—ss.

I, E. O. Patterson, Clerk of the District Court

of the United States for the District of Nevada, do hereby certify that I am custodian of the records, papers and files of the said United States District Court for the District of Nevada, including the records, papers and files in the case of United States of America, Plaintiff, vs. E. Vachina, Defendant, said case being No. 5396 on the docket of said court.

I further certify that the attached transcript, consisting of 75 typewritten pages numbered from 1 to 75, inclusive, contains a full, true and correct transcript of the proceedings in said case and of all papers filed therein together with the endorsements of filing thereon, as set forth in the praecipe filed in said case and made a part of the transcript attached hereto, as the same appears from the originals of record and on file in my office as such clerk in the City of Carson, State and District aforesaid.

I further certify that the cost for preparing and certifying to said record, amounting to \$17.45, has been paid to me by Mr. M. B. Moore, attorney for the defendant in the above-entitled cause. [74]

And I further certify that the original writ of error and the original citation, issued in this cause, are hereto attached.

WITNESS my hand and the seal of said United States District Court this 22d day of July, A. D. 1921.

[Seal] E. O. PATTERSON,
Clerk, U. S. District Court, District of Nevada.

**Letter of U. S. District Attorney Wm. Woodburn'
to Hon. E. S. Farrington.**

Time and Place of Holding Court: At Carson City
—First Mondays in February, May and October.

**DEPARTMENT OF JUSTICE.
OFFICE OF THE UNITED STATES
ATTORNEY.
DISTRICT OF NEVADA.**

Sept. 23, 1921.

Honorable E. S. Farrington,
U. S. District Judge,
Carson City, Nevada.

My dear Judge Farrington:

Referring to your letter of the 13th inst., you are advised that it is agreeable to me that you certify the bill of exceptions in the cases of the United States vs. Vachina and United States vs. Bachenberg.

As to the trial of Davis during the latter part of this month it is impossible, so far as my engagements are concerned, to arrange.

I expect to be in Carson in a day or two and will consult with you in reference to this matter.

Very sincerely yours,
WM. WOODBURN.

W: W.

[Endorsed]: Filed Sept. 27, 1921. E. O. Patterson, Clerk, U. S. Dist. Court, Dist., Nevada. By _____, Deputy Clerk. [76]

In the District Court of the United States, in and
for the District of Nevada.

INDICTMENT FOR VIOLATION OF NA-
TIONAL PROHIBITION ACT.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

E. VACHINA,
Defendant.

United States of America,
District of Nevada,—ss.

Certificate of Judge to Bill of Exceptions.

The foregoing was prepared and submitted to me as a Bill of Exceptions by the defendant Sept. 13th, 1921, and I do now, in pursuance of the foregoing consent of Wm. Woodburn, U. S. District Attorney for the District of Nevada, certify that it is full, true and correct, and has been settled and allowed and is made a part of the record in this cause.

Done in open court this 27th day of September, 1921.

E. S. FARRINGTON,
Judge. [77]

In the District Court of the United States for the
District of Nevada.

**Certificate of Clerk U. S. District Court to Trans-
script of Record.**

United States of America,
District of Nevada,—ss.

I, E. O. Patterson, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that I am custodian of the records, papers and files of the said United States District Court for the District of Nevada, including the records, papers and files in the case of United States of America, Plaintiff, vs. E. Vachina, Defendant, said Case being No. 5396 on the docket of said court.

I further certify that the attached transcript, consisting of 79 typewritten pages numbered from 1 to 79 inclusive, contains a full, true and correct transcript of the proceedings in said case and of all papers filed therein, together with the endorsements of filing thereon, as set forth in the praecipe filed in said case and made a part of the transcript attached hereto, as the same appears from the originals of record and on file in my office as such clerk in the City of Carson, State and District aforesaid.

I further certify that the cost for preparing and certifying to said record, amounting to \$18.70, has been paid to me by Mr. M. B. Moore, attorney for the defendant in the above-entitled cause. [78]

And I further certify that the original writ of

error, and the original citation, issued in this cause are hereto attached.

WITNESS my hand and the seal of said United States District Court this 27th day of September, A. D. 1921.

[Seal] E. O. PATTERSON,
Clerk, U. S. District Court, District of Nevada.
[79]

In the United States District Court for the District
of Nevada.

No. 5396.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
E. VACHINA,
Defendant.

Citation on Writ of Error (Original).

The United States of America,—ss.

The President of the United States to the United
States of America, GREETING:

To the United States of America:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, State of California, within thirty days from the date of this writ, pursuant to a writ of error duly allowed by the District Court of the United States in and for the District of Nevada and filed in the Clerk's office of said court on the

27th day of May, A. D. 1921, in a cause wherein E. Vachina is appellant and you are appellee, to show cause, if any, why the judgment and decree against the said appellant as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the party in that behalf.

WITNESS the Honorable E. S. FARRINGTON, Judge of the District Court of the United States, in and for the District of Nevada, this 27th day of May, A. D. 1921, and of the Independence of the United States, the one hundred and forty-fifth.

E. S. FARRINGTON,

District Judge. [80]

[Seal]

Attest: E. O. PATTERSON,

Clerk.

By _____,

Deputy.

Service of the within citation and receipt of a copy is hereby admitted this 27th day of May, A. D. 1921.

WM. WOODBURN,

U. S. Attorney, District of Nevada. [81]

[Endorsed]: No. 5396. In the United States District Court for the District of Nevada. United States of America, Plaintiff, vs. E. Vachina, Defendant. Citation. Filed May 27th, 1921. E. O. Patterson, Clerk.

In the United States District Court for the District
of Nevada.

No. 5396.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. VACHINA,

Defendant.

Writ of Error (Original).

The United States of America,—ss.

The President of the United States, to the Honorable The Judge of the District Court of the United States of America, in and for the District of Nevada, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, wherein the United States is plaintiff and E. Vachina is defendant, a manifest error hath happened, to the great damage of the said E. Vachina as by the indictment in said cause and the record of proceedings therein appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning

the same, to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, together with this writ, so that you have the same in the said [83] United States Circuit Court of Appeals at San Francisco, California, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable E. S. FARRINGTON, Judge of the said United States District Court of the District of Nevada, the 27th day of May, in the year of our Lord one thousand nine hundred and twenty-one.

E. O. PATTERSON,
Clerk of the United States District Court for the
District of Nevada.

Allowed by:

E. S. FARRINGTON. [84]

[Endorsed]: No. 5396. In the United States District Court for the District of Nevada. United States of America, Plaintiff, vs. E. Vachina, Defendant. Writ of Error. Filed May 27, 1921. E. O. Patterson, Clerk.

[Endorsed]: No. 3722. United States Circuit Court of Appeals for the Ninth Circuit. E. Vachina, Plaintiff in Error, vs. The United States of

America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Nevada.

Filed July 23, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 3722

United States
Circuit Court of Appeals
For the Ninth Circuit

E. VACHINA,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Brief for Plaintiff in Error

M. B. MOORE

Attorney for Plaintiff in Error.

Filed this.....day of....., 1922.

FRANK D. MONCKTON, Clerk.

By.....

FILED

Deputy Clerk.

FEB 7 - 1922

F. D. MONCKTON,
CLERK.

No. 3722

United States
Circuit Court of Appeals
For the Ninth Circuit

E. VACHINA,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Brief for Plaintiff in Error

STATEMENT OF THE CASE

I.

The above named plaintiff in error, E. VACHINA, on the 28th day of December, 1920, and thereafter, was conducting a soft drink establishment, in the rear of which was a dining room and

kitchen, where, at the time he was serving meals for himself and several boarders.

On the 28th of December, 1920, P. Nash, one of the Prohibition Enforcement Officers for the State and District of Nevada, went before Anna M. Warren, one of the United States Commissioners for the District of Nevada, for the purpose of securing a search warrant to search the premises and property of the said E. Vachina at No. 116 N. Center Street, in the City of Reno, Washoe County, State of Nevada, formerly known as the "Alpine Winery", and on said 28th day of December, 1920 made and filed the following affidavit. Transcript of Record upon Writ of Error page 3, also page 22:

"UNITED STATES OF AMERICA, DISTRICT OF NEVADA, COUNTY OF WASHOE.	}	ss.
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Affidavit

"On this 28th day of December, A. D. 1920, before me, Anna M. Warren, a United States Commissioner for the District of Nevada, personally appeared P. Nash, who being first duly sworn deposes and says:

"That he is and at all times herein mentioned was a Federal Prohibition Enforcement Agent in and for the District of Nevada and as such makes this affidavit and presents the facts, circumstances and conditions hereinafter set forth that heretofore came to the knowledge of and were ascertained by affiant for the purpose of having

issued hereon and hereunder a search-warrant, under and pursuant to the provisions of Title II of the National Prohibition Act, respecting the issuance of search-warrants, to search the following described premises, to-wit: The Alpine Winery together with all rear rooms, basements, and attic, cupboards, and every portion of said soft drink establishment situated at 116 North Center Street, in the City of Reno, County of Washoe, State of Nevada, Vachina Brothers proprietors; that affiant has knowledge and information that in and upon the aforesaid premises, and since Title II of the said National Prohibition Act went into effect, to-wit: after the first day of February, A. D. 1920, intoxicating liquor containing one-half of one percentum of alcohol, or more, by volume was and now is being manufactured, sold, kept, or bartered, for and fit for beverage purposes, in violation of Title II of the said National Prohibition Act and particularly of Section 21 of said Title II.

“That the facts, circumstances and conditions of which affiant has knowledge, and as ascertained by affiant are as follows, to-wit: Direct information by a certain citizen of Reno, whom affiant has known for several years and whom he considers absolutely credible and reliable, but whose name cannot be stated on this affidavit, that on the 24th day of December, 1920, said informant and a friend purchased alcoholic liquors from the proprietor of said Alpine Winery, said liquor being served and sold from the back room (kitchen) of said soft drink establishment. Said information was given to affiant under oath.

“That it will be necessary to search the above mentioned premises in order to secure the said intoxicating liquor and apparatus for the manu-

facture of same for the United States Government and that it will be impossible to secure the aforesaid intoxicating liquor and apparatus for the manufacture of same without the aid and use of a search-warrant.

“WHEREFORE affiant prays that a warrant to enter the above-mentioned premises and there to search for the said intoxicating liquor and apparatus for the manufacture of same be issued pursuant to the statutes in such case made and provided.

“(Signed)

P. NASH.

“Subscribed and sworn to before me this 28th day of December, 1920.

(SEAL)

ANNA M. WARREN,
United States Commissioner.”

After the filing of the foregoing affidavit the said Commissioner, Anna M. Warren, issued to the said P. Nash, a search-warrant to search the said premises, which search-warrant is as follows. Transcript of Record upon Writ of Error, page 25:

“The President of the United States of America,
To the United States Supervising Prohibition
Enforcement Agent, His Deputies, or Any or
Either of Them: Greetings:

“WHEREAS, P. NASH has heretofore, to-wit: on the 28th day of December, 1920, filed with me, Anna M. Warren, a United States Commissioner in and for the District of Nevada, at Reno, Nevada, his affidavit, in which he states that he is

a Federal Prohibition Enforcement Agent acting under the United States Supervising Agent at San Francisco, California; that in and upon those certain premises situated at 116 North Center Street, in the City of Reno, County of Washoe, State of Nevada, known as the Alpine Winery, together with all rear rooms, basements and attics, cupboards, and every portion of said soft drink establishment; proprietors of said Alpine Winery being Vachina Brothers; that affiant has knowledge and information that there is located and concealed, stored and kept, sold, possessed and bartered and fit for beverage purposes, in violation of Title II of said National Prohibition Act and particularly in violation of Section 21 of said Title II thereof intoxicating liquor containing one-half of one percentum or more of alcohol by volume;

“That it will be impossible for the United States Government to obtain possession of said intoxicating liquor without a search-warrant to enable the search to be made of the premises hereinabove described, whereupon affiant prays that a search-warrant issue.

“NOW, THEREFORE, pursuant to Section 25, Title II of the Act of October 28, 1919, known as the National Prohibition Act you are hereby authorized and empowered to enter said premises hereinabove described, in the daytime or in the night-time, and thoroughly to search each and every part of said premises for the said intoxicating liquor concealed in violation of the Act of October 28, 1919, and to seize the same and take it into your possession to the end that the same may be dealt with according to law and hereof to make due return with a written inventory of the property seized by you or any or

either of you without delay.

“WITNESS my hand this 28th day of December, 1920.

ANNA M. WARREN
U. S. Commissioner in and for the District
of Nevada.”

“(Endorsed)

Reno, Nevada, Dec. 30th, '20.

“Make return on within warrant as follows:

“Searched premises described within on Dec. 29th, 7 P. M., 1920.

“Seized as evidence one qt. bottle containing j. a. brandy from back room, and one gal. d. j. containing wine.

“Arrested proprietor, A. Vachina.

“I, P. Nash, the officer by whom this warrant was executed, do swear that the above inventory contains a true and detailed account of all property taken by me on the warrant.”

P. NASH,
Fed. Pro. Agt.

Thereafter, and on the 30th day of December, 1920 the said P. Nash, Prohibition Enforcement officer, accompanied by H. P. Brown, another Prohibition Enforcement officer, went to the premises described, and proceeded back into the kitchen where they found the plaintiff in error, E. Vachina; searched the premises and seized one quart bottle containing what is commonly called “jack-ass

brandy" and one gallon demijohn containing wine, as noted on the return of the search warrant. The plaintiff in error was arrested, taken before the United States Commissioner, and charged with unlawfully having liquor in his possession.

On the 6th day of January, 1921, a Motion to Quash the search-warrant was made before the Commissioner, Anna M. Warren. Transcript of Record upon Writ of Error, page 16:

"Comes now the defendant above named and moves the Court to quash, set aside and hold for naught the search-warrant issued out of the above-entitled court on the 28th day of December, 1920, against the premises at No. 116 North Center Street, in the City of Reno, Washoe County, Nevada, known as the "ALPINE WINERY," said premises being occupied by the above-named defendant, on the grounds and for the reasons that no sufficient affidavit and no sufficient deposition or depositions were filed or taken by the said Commissioner before the issuance of said search-warrant showing probable cause for the issuance thereof.

"Dated this 6th day of January, 1921.

MOORE & McINTOSH,
Attorneys for the Above-named Defendant."

And a notice of the said Motion served upon William Woodburn, United States District Attorney for the District of Nevada. Transcript of Record upon Writ of Error, page 15:

"To the Above-named Plaintiff, and WILLIAM

WOODBURN, U. S. District Attorney for the District of Nevada:

"You, and each of you, will please take notice that on Friday, the 7th day of January, 1921, at the hour of 2 o'clock P. M., or as soon thereafter as counsel can be heard, that the above-named defendant will move the Commissioner, Anna M. Warren, at her office in the Washoe County Bank Building in the City of Reno, Washoe County, Nevada, to quash, set aside and hold for naught the search-warrant issued by the said Anna M. Warren, as United States Commissioner in and for the District of Nevada, on the 28th day of December, A. D. 1920. That said motion will be made upon the grounds that there was no sufficient affidavit or deposition made, taken or filed with or before said Commissioner showing probable cause of any offence sufficient to warrant the issuance of said search-warrant. That there will be used upon the hearing of said motion the affidavit of P. Nash, made and filed before the said Anna M. Warren, Commissioner, aforesaid, on the 28th day of December, 1920, upon which said search-warrant was issued; also, the oral testimony of the said P. Nash, and all of the files of said cause in said Commissioner's court.

"Dated this 6th day of January, 1921.

MOORE & McINTOSH

Attorneys for the Above-named Defendant."

The Motion to Quash was presented and argued before the Commissioner and was, by the Commissioner, denied, and a full copy of proceedings certified up to the United States District Court for the District of Nevada.

Thereafter, at the February term of the United States District Court for the District of Nevada, an indictment was returned by the Grand Jury charging the plaintiff in error, E. Vachina, with unlawfully having intoxicating liquor in his possession contrary to Section III, Title II, of the National Prohibition Act.

Thereafter, and before trial, a motion was filed in the said District Court renewing the Motion to Quash made before the Commissioner. Transcript of Record upon Writ of Error, page 18:

“Comes now the defendant above named, and renews his motion to quash, set aside and hold for naught the search-warrant issued by Anna M. Warren, one of the Commissioners of the above-entitled court, on the 28th day of December, A. D. 1920, said motion having been made in said Commissioner’s Court, and heard on the 8th day of January, A. D. 1921, by the said Anna M. Warren, Commissioner aforesaid.

“Dated this 19th day of April, 1921.

MOORE & McINTOSH
Attorneys for Defendant.”

Which motion was denied by the Court and exceptions taken and allowed.

The plaintiff in error also filed in said cause, in the United States District Court an original Motion to Quash the indictment and to return the property seized thereunder. Transcript of Record upon Writ of Error, page 20:

“Comes now the defendant above named, and moves the Court to quash, set aside and hold for naught the search-warrant issued by Anna M. Warren, one of the Commissioners of the above-entitled Court, on the 28th day of December, A. D. 1920, said search-warrant directing a search of the premises at No. 116 North Center Street, in the City of Reno, Washoe County, Nevada, known as the “ALPINE WINERY”, and occupied by the above-named defendant, and moves the Court, further, to direct the return of one bottle of jackass brandy, and one wicker covered demi-john or bottle containing wine, claimed to have been seized in said premises and taken therefrom by one P. Nash, and is now in the possession of William Woodburn, United States District Attorney, which the said William Woodburn, United States District Attorney, intends to use at the trial of this defendant in an indictment now pending against him in this court, said motion being based upon the grounds that the affidavit made and filed in said cause for the issuance of said search-warrant was insufficient, and did not allege facts sufficient from which the Commissioner or magistrate could find or determine that probable cause existed that any offense was being committed in said premises or by said defendant; that said affidavit is based purely on hearsay; that no sworn deposition was made or filed before said Commissioner showing probable cause of any offense sufficient to warrant the issuance of said search-warrant, and that there were not sufficient allegation of facts or circumstances in said affidavit to warrant or justify the Commissioner in issuing a search-warrant for said premises. That said search-warrant was in violation of the defendant’s constitutional rights as guaranteed to him under and by virtue of the 4th Amendment to the Constitution of the United

States and that said search and seizure of said goods alleged by the said officers to have been taken therefrom is and will be in violation of defendant's constitutional rights guaranteed to him under the 4th Amendment to the Constitution of the United States and under the 5th Amendment to the Constitution of the United States.

"Dated this 19th day of April, 1921."

MOORE & McINTOSH
Attorneys for Defendant."

Also filing therewith and serving upon William Woodburn, United States District Attorney for the District of Nevada, a copy of the Motion to Quash and notice of Motion to Quash. Transcript of Record upon Writ of Error, page 19:

"To the Above-named Plaintiff, and WILLIAM WOODBURN, U. S. District Attorney for the District of Nevada:

"You, and each of you, will please take notice that on Tuesday, the 25th day of April, A. D. 1921, at the hour of 10 o'clock, or as soon thereafter as counsel can be heard, at the United States Federal Post Office Building, in Carson City, Nev., in the courtroom of the said above-entitled District Court, in said building, and before the Honorable E. S. Farrington, Judge of said District Court, the above-named defendant will move the Court to quash, set aside and hold for naught the search-warrant issued by Anna M. Warren, a United States Commissioner in and for the District of Nevada, on the 28th day of December, 1920. That said motion will be made

and based upon the grounds that there was no sufficient affidavit or deposition made, taken or filed with or before said commissioner, showing probable cause or any offense sufficient to warrant the issuance of said search-warrant. That there will be used upon the hearing of said motion, the files, records and all proceedings had and taken before the said Commissioner, and forwarded by said Commissioner to the Clerk of the said United States District Court; and the oral testimony of P. Nash and H. P. Brown, and of the said William Woodburn, United States District Attorney aforesaid, and the files in said cause now in the office of the said Clerk of the District Court. That at the said time and place, and upon the grounds and for the reason hereinbefore set forth, and all of them, the defendant will move the Court for the return of all property to the defendant and to the premises, seized by the said P. Nash and his associates from the said premises under the said search-warrant, and for the further reason that the seizure and removal of said property was in violation of defendant's constitutional rights under and by virtue of the 4th Amendment to the Constitution of the United States.

"Dated this 19th day of April, 1921.

MOORE & McINTOSH
Attorneys for Defendant."

This motion came on to be heard and argued before the Court and was by the Court denied on the 3d day of May, 1921. Transcript of Record upon Writ of Error, page 30:

"Ordered that the petition for the return of certain seized property and the motion to quash

the search-warrant be, and the same are hereby, denied. To which ruling Mr. M. B. Moore, attorney for defendant, asks and is granted the benefit of an exception."

On May 7th, 1921, said cause coming on for trial before a jury, after the jury was sworn and before the taking of any testimony, objection was made by M. B. Moore, Attorney for the plaintiff in error, to the introduction of any testimony in said cause. Transcript of Record upon Writ of Error, page 58:

"Mr. MOORE: If the Court please, I object to the introduction of any testimony in this case which goes to what the officers found and what they did under a certain search-warrant issued out of the Commissioner's court, which is a part of the files and records in this case, on the 28th day of December, 1920, and anything that they did or saw in the premises described in that search-warrant, or any testimony as to what was seized, if anything, there by the officer serving the same, on the grounds that the search-warrant was insufficient and void, for the reason that no proper and sufficient affidavit had been made or filed before the Commissioner, nor was any other sufficient testimony taken to warrant the issuance of the search-warrant under which the officers operated, or to show that probable cause existed that there was an offense being committed there in violation of the Prohibition Act, or any other law of the United States; or that this defendant had or was committing any offense, on the grounds that the search and seizure was in violation of his constitutional rights, as provided under the Fourth Amendment to the Constitution of the United States; and that the use

and introduction of any testimony so secured would be in violation of his constitutional right, as provided in the Fifth Amendment of the Constitution of the United States; basing the objection on the proceedings heretofore had, and the files in this case.

“The COURT: The objection will be overruled.

“Mr. MOORE: Give us the benefit of an exception.

“The COURT: The exception will be noted.”

During the examination of the witness, H. P. Brown, for the Government, objection was made to the following question. Transcript of Record upon Writ of Error, page 60:

“Q. What, if anything, did you find, Mr. Brown?

“Mr. MOORE: I object to what this witness may have found, or what he saw, or what he did, in these premises at that time, basing my objection on the general grounds laid down in my first objection to the introduction of any testimony.

“The COURT: It will be the same ruling, and you may have the same exception.”

Also to the admission in evidence of the bottle and demijohn and their contents. Transcript of Record upon Writ of Error, page 63:

“Mr. DISKIN: We offer in evidence the bottle and its contents and the demijohn and its contents.

“Mr. MOORE: We object, if the Court please, on the grounds heretofore stated.

“The COURT: It will be the same ruling and same exception.”

During the course of the examination of the witness for the Government, P. Nash, objection was made to a question propounded. Transcript of Record upon Writ of Error, page 67:

“Q. What was the defendant doing—you mean Vachina?

“Mr. MOORE: I object to any testimony as to what the defendant was doing, or what this witness saw or did at that time, basing my objection on the grounds heretofore stated.

“The COURT: Same ruling and exception.”

At the close of the testimony of the witness, P. Nash, a motion was made to strike from the record the testimony of both the witnesses, H. P. Brown and P. Nash. Transcript of Record upon Writ of Error, page 73:

“Mr. MOORE: Now, if the Court please, I move the Court to strike from the record the testimony of Mr. Nash and of Mr. Brown relative to what they did on the evening as detailed by them; also all evidence as to what they found on that evening in the premises described by them, for the reason and on the grounds that it now appears from their testimony and the records of this Court, that they were operating under a search-warrant which was invalid, it having been issued upon an affidavit, which affidavit was insufficient, and that their actions thereunder were in violation of the constitutional rights of the defendant, as provided

by the Fourth Amendment of the Constitution; and that the introduction of such testimony is in violation of the constitutional rights of the defendant as provided under the Fifth Amendment to the Constitution.

“The COURT: It will be the same ruling and the same exception.”

S. C. Dinsmore was called as a witness in behalf of the Government to testify to chemical analysis of the exhibits Nos. 1 and 2. Objection was made to the question. Transcript of Record upon Writ of Error, page 74:

“Q. What did your examination disclose as to the alcoholic contents of the same?

“Mr. MOORE: If the Court please, we object to the question on the grounds heretofore stated to the other question.

“The COURT: The same ruling and exception.”

The Court orally instructed the jury, no exception was taken to such instructions. The jury retired, returned the verdict of guilty as charged. Before sentence was pronounced, Motion for New Trial was made. Transcript of Record Upon Writ of Error, page 38:

“Comes now the defendant named above and moves the Court that a new trial be granted for the following reasons, and on the following grounds, to-wit:

"1st. That the Court erred on its decision upon questions of law arising during the course of the trial.

"2d. That the verdict of the jury is contrary to law."

MOORE & McINTOSH
Attorneys for Defendant."

Which motion was denied and exception taken to such order, and the defendant sentenced to pay a fine of Five Hundred (\$500.00) Dollars and costs. Transcript of Record upon Writ of Error, page 33:

"This being the time heretofore appointed for passing sentence in this case, Mr. Wm. Woodburn, U. S. Attorney, appeared on the part of the plaintiff; Mr. M. B. Moore, for defendant, who was also present. Mr. Moore presents his motion for a new trial, which was denied by the Court and an exception taken by counsel. Therefore the Court pronounced judgment as follows: ORDERED that the defendant pay to the United States a fine of Five Hundred Dollars and that he stand committed to the care of the marshal until the fine and costs incurred herein are paid."

Thereupon, the defendant caused to be filed a petition for Writ of Error, which appears in Transcript of Record on Writ of Error, page 49.

The Court, thereupon, made and entered an order allowing the Writ of Error. Transcript of Record on Writ of Error, page 50.

Citation on Writ of Error was issued and served. Transcript of Record upon Writ of Error,

pages 83 and 84.

Thereafter, Writ of Error was allowed. Transcript of Record upon Writ of Error, page 85.

Assignment of Errors filed; Transcript of Record on Writ of Error, page 39.

Bail bond on Writ of Error Filed; Transcript of Record on Writ of Error, page 52.

The same approved; Transcript of Record on Writ of Error, page 54.

Cost Bond on Writ of Error filed and approved; Transcript of Record on Writ of Error, pages 55 and 56.

The Assignment of Errors filed are eight in number, but in reality raise but two questions to be determined. Assignment of Errors Nos. I, II, III, IV, V, VI, and VIII, raise but one main question and that is, the legality and sufficiency of the affidavit of P. Nash upon which the search warrant was issued and including the legality of the search warrant itself.

Assignment No. VII, to-wit: That the Court erred in overruling defendant's motion made in said cause, in which the defendant renewed the motion made before the Commissioner, Anna M. Warren, to quash, set aside, and hold for naught the search warrant issued on the 28th day of December, raises

the question as to whether or not the District Court will review the proceedings had before the Commissioner.

II.

The questions raised by the Assignment of Errors Nos, I, II, III, IV, V, VI, and VIII are all based upon, and grow out of the proposition involved in the motion referred to under Assignment No. VIII, "That the said Court erred in overruling and denying defendant's motion made in this cause to quash the search-warrant issued by Anna M. Warren, a United States Commissioner in and for the District of Nevada, on the 28th day of December 1920, and for the return to the defendant of the property taken under said search-warrant."

The search-warrant mentioned in the foregoing Assignment of Errors was issued as the result of an affidavit filed before the Commissioner, Anna M. Warren, at the time the search-warrant was issued. The facts alleged in the affidavit are as follows; Transcript of Record upon Writ of Error, bottom of Page 4:

"That the facts, circumstances and conditions of which affiant has knowledge, and as ascertained by affiant are as follows, to-wit: Direct information by a certain citizen of Reno, whom affiant has known for several years and whom he considers

absolutely credible and reliable, but whose name cannot be stated on this affidavit; that on the 24th day of December, 1920, said informant and a friend purchased alcoholic liquors from the proprietor of said Alpine Winery, said liquor being served and sold from the back room (kitchen) of said soft drink establishment. Said information was given to affiant under oath."

It was urged in the Court below, and is now urged here, that the said statement of fact was insufficient and did not allege any fact from which the Commissioner could determine that probable cause existed for the issuance of the search-warrant.

The said statement is purely hearsay and states no fact within the knowledge of the person making the affidavit. Under no rule of evidence could the statement be admitted upon the trial of a person charged with any offense. The statement does not square with the Fourth Amendment to the Constitution of the United States:

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

Neither does the said statement conform to the requirements of the law providing for the issuance of search-warrants in such cases. See Act of June 5th, 1917, commonly called "Espionage Act", Sections 3, 4, and 5 thereof which provide in substance that no search-warrant shall be issued but upon probable cause supported by an affidavit naming or describing the person, and particularly describing the property and place to be searched—and that the magistrate must, before issuing the warrant, examine on oath the complainant and any witnesses he may produce—and the depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist. The same Act provides in Section 19 thereof that any person making a false affidavit for the purpose of securing the search-warrant shall be punished, as provided in Sections 125-126 of the Criminal Code of the United States. Sections 125-126 of the Criminal Code provide for the prosecution and punishment of anyone committing perjury; query, in the statement referred to could any person be successfully prosecuted for perjury for the making thereof.

The question as to the sufficiency of an affidavit from which the magistrate issuing the search-warrant may determine that probable cause exists for the issuance thereof, has often been before the Court and as often determined, and in no instance,

so far as the author of this Brief can find, has such a statement of facts as the foregoing ever been held sufficient. In Case No. 12,126, In Re: Rule of Court, Federal Cases decided in 1877 by the Circuit Court for the Northern District of Georgia, Bradley, Circuit Justice, in referring to cases similar to the case at bar, says:

“I am informed by his Honor, the District Judge, that great inconvenience is caused in this district by the arrest of persons charged with offenses against the revenue laws, against whom no sufficient evidence can be produced, either before the grand jury to warrant an indictment, or before the traverse jury to justify a conviction, whereby much useless expense is caused to the government, and the personal liberty of the people is unnecessarily interfered with. One cause of this evil seems to be the fact that warrants are issued upon the affidavit of some officer, who, upon the relation of others whose names are not disclosed, swears that, upon information, he has reason to believe, and does believe, the person charged has committed the offense charged. The District Judge, not being satisfied that this is a sufficient ground for issuing a warrant of arrest, has desired my advice in the matter. After examination of the subject, we have come to the conclusion that such an affidavit does not meet the requirements of the constitution, which, by the Fourth Article of the Amendments, declares that the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and that no warrants shall issue but upon probable cause, supported by oath or affirmation, describing the place to be searched and the

persons to be seized. It is plain from this fundamental enunciation, as well as from the books of authority on criminal matters in the common law, that the probable cause referred to, and which must be supported by oath or affirmation, must be submitted to the committing magistrate himself, and not merely to an official accuser, so that he, the magistrate, may exercise his own judgment on the sufficiency of the ground shown for believing the accused person guilty; and this ground must amount to a probable cause of belief or suspicion on the party's guilt. In other words, the magistrate ought to have before him the oath of the real accuser, presented either in the form of an affidavit, or taken down by himself by personal examination, exhibiting the facts on which the charge is based and on which the belief or suspicion of guilt is founded. The magistrate can then judge for himself, whether sufficient and probable cause exists for issuing a warrant. It is possible that by exercising this degree of caution, some guilty persons may escape public prosecution, but it is better that some guilty ones should escape than that many innocent persons should be subjected to the expense and disgrace attendant upon being arrested upon a criminal charge, and this was undoubtedly the beneficent reason upon which the constitutional provision referred to was founded.

“In view of these considerations, and to correct the evil alluded to, we have prepared and now make the following general order for the guidance of the commissioners of this court, in the manner of issuing warrants of arrest against persons charged with crime, to-wit: No warrant shall be issued by any commissioner of this court for the seizure or arrest of any person charged with a crime or offense against the laws of the

United States upon mere belief, or suspicion of the person making such charge; but only upon probable cause, supported by oath or affirmation of such person, in which shall be stated the facts within his own knowledge constituting the grounds for such a belief or suspicion."

That such a statement as that found in the affidavit in this case is insufficient, has been decided by numerous courts, and amounts to nothing more than a statement upon information and belief of the party making it—therefore, is insufficient. We cite, as directly bearing upon this question, the following:

U. S. v. Frieberg, 233d Fed. 313;
 U. S. v. Veeder, 252d Fed. 414;
 In Re: Tri-State Coal Co. 253d Fed. 605;
 U. S. v. Weeks, 232 U. S. 383;
 U. S. v. Baumert, 179th Fed. 735;
 Beavers v. Hinkle, 194th U. S. 73; (48th L. Ed. 82);
 U. S. v. Tureand, 20th Fed. 621;
 Ex Parte Rhodes, 1st A. L. R. 568;
 People v. Glennon, 74th N. Y. Supplement, 794;
 State v. Gleason, 4th Pac. 363;
 In Re: Kellam, 41st Pac. 960.

III.

Assignment of Error No. II:

"That the said Court erred in overruling defendant's objection to the introduction of testimony, made after the jury was impaneled and sworn to try said cause, and before any testimony as to

the facts was introduced at said trial;" which Assignment of Error was based upon the insufficiency of the search-warrant and of the affidavit.

Also, Assignment of Error No. III:

"To the admission of the testimony of the witness H. P. Brown, as to what he saw, found and did under the search-warrant;" which assignment was based upon the same ground

And Assignment of Error No. IV:

"The objection to the testimony of P. Nash as to what he saw, found and did under the said search-warrant;" also based upon the grounds of the insufficiency of the search-warrant and of the affidavit, can be determined under the same authorities as heretofore cited.

Assignment of Error No. V:

"That the Court erred in overruling the motion of defendant to strike the testimony from the record of Brown and Nash;" for the reason, as stated in the objection, that the testimony was secured by means of an invalid search-warrant, based upon an insufficient affidavit, should also be determined in the affirmative by this Court.

It will be observed from the record and references heretofore made in this Brief that the quesiton had been repeatedly raised before the

Court as to the admission of this testimony, and the reasons why it should not be admitted repeatedly urged and presented to the Court.

In the case of *Gouled v. U. S.*, Supreme Court Advance Opinions, April 1st, 1921, page 311, published in the 65th L. Ed., the Court, in response to the sixth question propounded, to-wit:

“If papers of evidential value only be seized under a search-warrant, and the party from whose house or office they are taken be indicted,—if he then move before trial for the return of said papers, and said motion is denied,—is the court at trial bound in law to inquire as to the origin of or method of procuring said papers when they are offered in evidence against the party so indicted?”

The Court says:

“It is plain that the trial court acted upon the rule, widely adopted, that courts in criminal trials will not pause to determine how the possession of evidence tendered has been obtained. While this is a rule of great practical importance, yet, after all, it is only a rule of procedure and therefore it is not to be applied as a hard-and-fast formula to every case, regardless of its special circumstances. We think, rather, that it is a rule to be used to secure the ends of justice under the circumstances presented by each case; and where, in the progress of a trial, it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an objection to their admission, or a motion for their exclusion, and to consider and

decide the question as then presented, even where a motion to return the papers may have been denied before trial. A rule of practice must not be allowed for any technical reason to prevail over a constitutional right."

The law as enunciated in the Gouled case, is not limited to the introduction of papers in evidence alone, but extends to the introduction of any matter in evidence, either by way of oral testimony or exhibits that were secured by the Government in an unconstitutional manner.

Weeks v. U. S. 232d U. S. 383; 58th L. Ed. 632;
Gouled v. U. S. *supra*.

Lawrence Amos v. U. S.-U. S. Supreme Court
Advance Sheets, April 1st, 1921, page 316, also
published in 65th L. Ed.

Holmes v. U. S. 275th Fed. 49;

Roy Youman v. Commonwealth of Kentucky,
13th A. L. R. page 1303; also found in the
224th Southwestern, page 860;

State of Wyoming v. Theo. Peterson, 13th A. L.
R. page 1284.

IV.

The aforesaid Assignment of Errors, seven in number, are all primarily based upon the insufficiency of the affidavit filed before the Commissioner for the issuance of the search-warrant, in that the said affidavit did not contain any allegation of fact from the Commissioner could determine that probable cause existed for the issuance of said search-warrant.

In the case of *Veeder v. U. S.* Fed. 252, page 414, decided by the Circuit Court of Appeals for the Seventh Circuit, the Court says: (on page 418)

“A brief statement of the applicable principles of law will suffice, for they are so well settled, so obvious from a reading of the constitutional and statutory provisions in question, so founded in the instinctive sense of natural justice, that no elaboration of the grounds therefor is needed.

“One’s person and property must be entitled, in an orderly democracy, to protection against both mob hysteria and the oppression of agents whom the people have chosen to represent them in the administration of laws which are required by the Constitution to operate upon all persons alike.

“One’s home and place of business are not to be invaded forcibly and searched by the curious and suspicious; not even by a disinterested officer of the law, unless he is armed with a search-warrant.

“No search warrant shall be issued unless the judge has first been furnished with facts under oath—not suspicions, beliefs, or surmises—but facts which, when the law is properly applied to them, tend to establish the necessary legal conclusion, or facts which, when the law is properly applied to them, tend to establish probable cause for believing that the legal conclusion is right. The inviolability of the accused’s home is to be determined by the facts, not by rumor, suspicion, or guesswork. If the facts afford the legal basis for the search warrant, the accused must take the consequences. But equally

there must be consequences for the accuser to face. If the sworn accusation is based on fiction, the accuser must take the chance of punishment for perjury. Hence the necessity of a sworn statement of facts, because one cannot be convicted of perjury for having a belief, though the belief be utterly unfounded in fact and law.

“The finding of the legal conclusion or of probable cause from the exhibited facts is a judicial function, and it cannot be delegated by the judge to the accuser.”

Assignment No. V, based upon the motion to strike the testimony of Nash and Brown from the record, on the grounds that all of such testimony was secured under a search-warrant which was invalid; there is another question raised not directly covered in the foregoing citations. That question is, “Was the search-warrant itself a legal search-warrant?” Copy of the search-warrant in question will be found on page 25 and 26 of the Transcript of Record upon Writ of Error.

It is the contention of the plaintiff in error that the search-warrant is particularly deficient for two reasons:

First: That there is no finding of probable cause made by the Commissioner contained in the search-warrant. For this reason the search-warrant itself conferred no authority upon the officers to make the search. Before a commissioner or magistrate can legally issue a search-warrant it is

necessary that the magistrate judicially determine that probable cause exists for the issuance of the search-warrant, and such finding of probable cause is similar to the finding and statement of probable cause in a warrant of commitment, or other warrant; and in such warrants it is necessary that a finding of probable cause be made.

In Re: Van Campen, Fed. Case No. 16,835;
U. S. v. Brawner, 7th Fed. Rep. page 86;

Second: The search-warrant was invalid for the reason that no direction or instruction contained therein authorizing and directing the officer serving the same to either arrest the person in possession of the premises or of the property sought to be seized, and that there was no direction that the property be brought before the Commissioner.

White v. Wagner, 50th L. R. A., page 60, and other cases hereinbefore cited.

V.

Assignment of Errors No. VII:

“That the said Court erred in overruling defendant’s motion made in said cause in which the defendant renewed the motion made before the Commissioner, Anna M. Warren, to quash, set aside and hold for naught the search-warrant issued by Anna M. Warren on the 28th day of December, A. D. 1920;” raises the question as to

whether or not the District Court has the right to review, or will review, any proceedings before the Commissioner; that the trial court has the power to review the acts of the Commissioner, we think, is determined by the following authorities:

Browner v. U. S., 7th Fed. page 86;
 Ex Parte Ballam, 8th U. S., pages 75, 114;
 In Re: Martin, Fed. Cases, No. 9,151;
 U. S. v. Shepherd, Fed. cases No. 16,273;
 In Re: Buford, Fed. Cases, 2,148;
 Foster's Fed. Practice, Vol. 2, Sec. 488, page 1623.

VI.

In view of the questions raised herein upon the Writ of Error and upon the authorities herein cited, the plaintiff in error should prevail and the cause be remanded to the District Court with directions to quash the search-warrant and to exclude and suppress all testimony secured thereby, and the action be dismissed.

Respectfully submitted,

M. B. MOORE,

Attorney for Plaintiff in Error.

No. 3722

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United States
Circuit Court of Appeals

For the Ninth Circuit

E. VACHINA,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Brief for Defendant in Error

M. A. DISKIN,
Assistant U. S. Attorney,
WM. WOODBURN,
U. S. Attorney for Nevada,
Attorneys for Defendant in Error.

Filed this.....day of....., 1922.

FRANK D. MONCKTON, Clerk.

By.....
Deputy Clerk.

FILED

FEB 25 1922

F. D. MONCKTON,
CLERK.

NO. 3722

United States
Circuit Court of Appeals
For the Ninth Circuit

E. VACHINA,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Brief for Defendant in Error

STATEMENT OF FACTS.

The evidence as contained in the Transcript discloses that Plaintiff in Error, at the time of his arrest and the seizure of intoxicating liquors, was conducting a soft drink parlor designated as "Alpine Winery."

That the premises occupied by defendant at that

time, consisted of a barroom, diningroom and kitchen, all on one floor.

On December 29th, 1920, Prohibition officers entered upon the premises through the back door which brought them into the kitchen; the diningroom and barroom being connected with the kitchen. The plaintiff in error, when the officers entered, was standing on a table in the kitchen putting a curtain on the window. The demijohn containing the substance described as jackass brandy and the bottle containing the wine, were under the table in the kitchen. (Tr. Page 66).

It appears without contradiction that at the time the officers entered the premises, they had definite information that Plaintiff in Error was selling intoxicating liquors from the kitchen of said premises.

It is admitted that the premises described as the Alpine Winery was a public place and therefore an implied invitation to enter was extended to the public. There is no contention and no testimony was introduced to establish that Vachina was occupying any part of the premises as his home, or that any part of said premises were being occupied by any one for any other purpose than business.

The statement is, we believe, warranted from the evidence adduced, that no search was made of the premises and that the liquor seized was in plain sight underneath the table in the kitchen.

PLAINTIFF IN ERROR'S CONTENTION.

What might be stated to be the basic error relied upon by Plaintiff in Error is:

(a) **That the affidavit for the issuance of the**

search warrant is insufficient because of the failure to state therein, facts sufficient to establish probable cause and that by reason thereof the search warrant was void.

In attempting to take advantage of this alleged error, there was filed a motion to quash the search warrant before the United States Commissioner who issued the same, which motion was by the said Commissioner denied.

(b) The action of the United States Commissioner in denying the motion to quash the search warrant was attempted to be reviewed in the District Court and the refusal of the District Court to entertain the Motion is alleged as error.

(c) Thereafter a motion to quash the search warrant issued by the United States Commissioner was filed in the District Court after the Indictment was returned, and it is alleged that the Court erred in denying said motion.

(d) The insufficiency of the affidavit for the issuance of a search warrant was again attacked by objections interposed to the testimony of witnesses Nash and Brown upon the trial of the case.

(e) That the search warrant was illegal.

GOVERNMENT'S CONTENTION.

Taking up the points urged by Plaintiff in Error in the order in which they are presented, we respectfully maintain that:

(1) The affidavit upon which the search warrant issued, was sufficient.

(2) That under the facts as shown by the testi-

mony, no search warrant was required.

In order for plaintiff in error to be successful in obtaining a reversal of this case, it is necessary that it be established to the Court's satisfaction that the affidavit for the search warrant was insufficient and also that, under the facts, a seizure was not authorized without a warrant. This, of necessity, is the alleged primary right invaded and from it flows the other alleged errors relied upon.

If the affidavit for search warrant was sufficient, or, if a seizure could be lawfully made without a warrant, the case of plaintiff in error collapses and the points urged under the other assignments or error need not be determined.

The particular portion of the affidavit for search warrant that is urged as being insufficient to warrant a finding of the probable cause, reads as follows:

“That the fact, circumstances and conditions of which affiant has knowledge and as ascertained by affiant are as follows, to-wit: Direct information by a certain citizen of Reno whom affiant has known for several years and who he considers absolutely credible and reliable, but whose name cannot be stated in this affidavit: That on the 24th day of December, 1920, said informant and friend purchased alcoholic liquors from the proprietor of said Alpine Winery; said liquor being served and sold from the back room (kitchen of said soft-drink establishment); said information was given to affiant under oath.”

It is disclosed from this statement that the party giving the information to the prohibition officer was first placed under oath. It further appears from the

affidavit that the informant was known to the prohibition officer for a number of years and was considered absolutely credible and reliable.

The Commissioner, when these facts were presented to her, was thereby advised of affiant's estimation of the credibility of the party giving the information. The source of affiant's information is disclosed and the facts are stated, to-wit:

"That on the 24th day of December, 1920, informant and a friend purchased liquor from the proprietor of the Alpine Winery and that the liquor was served and sold from the back room (kitchen)."

It will be noted therefore:

(a) That the party making the affidavit stated the facts which would tend to establish the credibility of the informant.

(b) There is not stated conclusions, but facts.

(c) That an oath was administered to the informant prior to a statement of the facts.

We submit that these facts meet the requirements of the constitutional provision and establish probable cause.

Many cases are cited by council in support of his theory that the affidavit for a search warrant is insufficient, but we insist that he has failed to cite any case holding that the facts of the same completeness and fullness as that set out in the instant case are insufficient.

A reading of the decisions cited by counsel afford no assistance in the determination of the validity of the affidavit in this case, for the reason that in a

great number of these cases the Court simply passed upon the sufficiency of an affidavit that contained the mere recital, "That affiant is informed and believes, or, "That affiant has good reason to believe," etc. The decisions in that respect are undoubtedly good law, but it is to be observed that in all of these cases the source of the information was not divulged nor is there stated therein the information received.

In the case of the United States vs. Friedberg, 233 Fed. 313, cited by counsel, the point determined by the Court was that under a search warrant authorizing the search of premises located at 234 North Third Street, and commanding the seizure of "Leaf tobacco, the ingredients thereof, and utensils used in the manufacturing of same," a search of defendant's private residence at No. 1516 Moyanensing Avenue and the seizure of the private books and papers was not authorized. In other words, it was very properly held by the Court that a search warrant authorizing the search of certain premises for leaf tobacco, did not permit the seizure of private papers at premises other than those described in the warrant. It is very plain, therefore, that this case is not in point.

United States vs. Veeder, 255 Federal 414, is cited. The affidavit for search warrant in this case recited, "That affiant has good reason to believe and does verily believe," etc. The source of affiant's information or the facts upon which he based his belief were not recited in the affidavit. In passing upon this affidavit, the Circuit Court of Appeals of the Seventh Circuit said:

"Applying these principles to McIsaac's affi-

davit, we observe that not a single statement of fact is verified by his oath. All he swears to is that, 'He has good reason to believe and does verily believe so and so; he does not swear that so and so are true, he does not say why he believes. **He gives no facts or circumstances to which the Judge could apply the legal standard and decide that there was a probable cause for affiant's belief.** There is nothing but affiant's application of his own undisclosed notion of the law to an undisclosed side of facts and in our system of government the accuser is not permitted to be also the defendant."

This case is readily distinguishable from the instance case in many respects. The court in the case cited held the affidavit to be deficient for the following reasons:

- (1) **That he does not swear as to the truth of any fact:**
- (2) **He does not say why he believes.**
- (3) **He gives no facts or circumstances to which the Judge could apply the legal standard and decide that there was a probable cause for affiant's belief.**
- (4) **There was simply his undisclosed notion of the law to an undisclosed state of facts; none of these deficiencies exists in the case now before the court for consideration.**

We submit that the commissioner was fully and sufficiently apprised of a condition existing upon the premises desired to be searched, sufficient at least for her to apply the legal standard and decide whether or not there was probable cause of believing that defendant had in his possession intoxicating liquor.

In the case of in Re Tri-State Coal and Coke Company, cited by Plaintiff in Error, the Court held that seizure of articles not described in the search warrant was unlawful. It was further decided by the Court in that case that the affidavit for a search warrant was defective because, "It does not even set forth the person who committed the alleged felonies, does not sufficiently designate and describe the property to be seized, does not show how the books and papers were used, as the means of committing a felony."

The Weeks case, 232 United States, 383, we respectfully submit did not involve the sufficiency of an affidavit for search warrant. A reading of this case will disclose that no search warrant was issued.

United States vs. Baumert, 179 Federal, Page 735; the District Court holds that an information filed by the District Attorney must be supported by an affidavit based upon positive knowledge. It was further announced by the Court in its decision that it was not necessary for the party having knowledge of the facts to come before the commissioner and testify but an affidavit made before a person duly qualified to administer oaths was sufficient compliance with the law.

In the instant case, while the record is silent as to whether or not the statement made to affiant was filed with the commissioner, it does affirmatively appear that the party giving the information was first sworn to tell the truth. If the rule of law announced in this case is correct, we submit it is not necessary that the party be brought before a Commissioner. It is sufficient if the statements he makes are made under the sanctity of an oath.

The Plaintiff in Error, in his brief, quotes at length from the case No. 12,126, Federal Cases:

It will be noted that one of the vices complained of by the District Judge was the fact that warrants are issued based upon information and that the party making the affidavit states he has reason to believe and does believe that the person charged has committed the offense.

In the instant case, it cannot be said that the same vice appears from the reading of the affidavit, for, as we have already stated, the party making the affidavit sets forth the information he received. Therefore, the affiant does not state his conclusion to the commissioner but states rather, the ultimate facts and the commissioner is then permitted to form his own conclusion from these facts as to the existence of probable cause.

Section 25, Title II of the National Prohibition Law, provides that a search warrant may issue as provided in Title Eleven of Public Law No. 24, 65 Congress, approved June 15, 1917. This is the authority for issuing search warrants under the National Prohibition Law. This act is also described as the Act of June 15, 1917, 40 Statutes at Large, 228.

Section 3 of 40 Statutes at Large 228, provides:

A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property and the place to be searched.

That the provisions of a search warrant contemplate the issuance of the search warrant upon in-

formation and belief, is fully sustained by Section 10 which provides:

The Judge, or commissioner, must insert a direction in the warrant that it be served in the day time unless the affidavits are **positive** that the property is on the person or in the place to be searched, in which case he may insert a direction that it be served at any time of the day or night.

The District Court of New York in the case of *in Re Rosenwasser Brothers*, 254 Fed. 171 had before it for decision whether facts stated in an affidavit were sufficient to warrant a finding of probable cause. The Court stated:

Probable cause must be shown from the facts alleged. It is not sufficient to aver nothing beyond the belief of an individual that such facts could be set forth. The conclusion from the averments of facts must be that of the magistrate, and not upon the opinion of the affiant. *United States vs. Tureaud* (C. C.) 20 Fed. 621; *United States vs. Baumert* (D. C.) 179 Fed. 735, and cases therein cited.

But the averments of facts need not be by an eyewitness. Allegations on information can be stated, if the facts so referred to and the source of the information are stated. The expression of belief in those facts is customary and required, but does not of itself constitute an allegation which will take the place of the statement of the alleged facts themselves. *Beavers vs. Henkel*, 194 U. S. 73, 24 Sup. Ct. 605, 48 L. Ed. 882.

But the evidence need not be given in detail, nor need the allegations be made by all the parties who will be called to prove them at the hearing. A direct affidavit that facts exist from which prob-

able cause is inferable is sufficient. So is a statement that information as to the facts has been obtained from named sources, if the facts are recited. *Beavers vs. Henkel*, *Supra*, 194 U. S. at page 86, 24 Sup. Ct 605, 48 L. Ed. 882.

The Supreme Court of the United States in the case of *Beavers vs. Henkel*, 194 U. S. at page 73; 48 Law Edition, page 882, announced a principle of law which we feel should materially assist the Court in deciding the issue here presented. While this case is cited by plaintiff in error, we believe that the holding in that case fully sustains the position of the Government. The case involves the sufficiency of a complaint on information and belief in a removal proceeding, but as in the instant case, there was a full disclosure set out in the said affidavit of the character of the information received from the informant by the affiant. We feel that the decision in this case by the Supreme Court of the United States is of such importance that a quotation from it is warranted. The Court, in passing upon this question,, stated.

“‘It is further contended that there was no jurisdiction to apprehend the accused, because the complaint on removal was jurisdictionally defective, in that it was made entirely upon information, without alleging a sufficient or competent source of the affiant’s information, and ground for his belief, and without assigning any reason why the affidavit of the person or persons having knowledge of the facts alleged was not secured.’

“This contention cannot be sustained. The complaint alleges on information and belief that *Beavers* was an officer of the government of the United States in the office of the First Assistant

Postmaster General of the United States; that, as such officer, he was charged with the consideration of allowances for expenditures, and with the procuring of contracts with and from persons proposing to furnish supplies to the said Postoffice Department; that he made a fraudulent agreement with the Edward J. Brandt-Dent Company for the purchase of automatic cashiers for the Postoffice Department and received pay therefor; that an indictment had been found by the Grand Jury of the eastern district, a warrant issued and returned 'not found,' and that the defendant was within the southern district of New York. This complaint was supported by affidavit, in which it was said:

"Deponent further says that the sources of his information are the official documents with reference to the making of the said contract and the said transactions on file in the records of the United States of America and in the Postoffice Department thereof and letters and communications from the Edward J. Brandt-Dent Company with reference to said contract, and from the indictment, a certified copy of which is referred to in said affidavit as Exhibit A, and the bench warrant therein referred to as Exhibit B, and from personal conversations with the parties who had the various transactions with the said George W. Beavers in relation thereto; and that his information as to the whereabouts of the said George W. Beavers is derived from a conversation had with the said George W. Beavers in said southern district of New York in the past few days, and from the certificate of the United States marshal for the eastern district of New York, indorsed on said warrant.'

"This disclosure of the sources of information was sufficient. In *Rice vs. Ames*, 180 U. S. 371, 45 L. Ed. 577, 21 Sup. Ct. Rep 406, a case of ex-

tradition to a foreign country, in which the complaint was made upon information and belief, stating the sources of his information and the grounds of his belief, and annexing to the complaint a properly certified copy of any indictment or equivalent proceeding which may have been found in the foreign country, or a copy of the depositions of witnesses having actual knowledge of the facts, taken under the treaty and act of Congress. This will afford ample authority to the commissioner for issuing the warrant."

We have made a painstaking examination of the authorities involving the sufficiency of affidavits and find none which holds that probable cause cannot be established upon information and belief when the information and its source is set out in the affidavit. The precise question which is presented to this Court for its decision is whether or not the facts set out in the affidavit herein quoted were sufficient in their allegations as to induce in the minds of a reasonable, cautious and prudent person, the belief or well-founded suspicion that there was intoxicating liquor upon the premises. This was the test laid down in the case of *Wiley vs. State* (Ariz.) 170 Pac. 869; 3d A. L. R., page 373, 376.

We also cite the case of *Ocampo vs. the United States*, page 58 Law Edition page 1231, wherein the Supreme Court of the United States held that, "The preliminary investigation conducted by the prosecuting attorney of the city of Manila and upon which he files a sworn information against the party accused, is sufficient compliance with the requirements of the constitution, to-wit: that no warrant was issued but upon probable cause supported by oath or

affirmation.”

Probable cause, as defined by 32 Cyc. 402, is as follows:

“Belief founded on reasonable grounds. That apparent state of facts found to exist upon reasonable inquiry. That is, such inquiry as the given case rendered convenient and proper, which would induce a reasonably intelligent and prudent man to believe that the accused person in a criminal case had committed the crime charged.”

In the case of *Griswold vs. Griswold*, 77 Pac., 672, probable cause was defined as the common standard of human judgment and conduct. In the case of *State vs. Davie*, 22NW, 411, it was held that probable cause does not mean actual and positive cause.

(2) That under the facts as shown by the testimony, no search warrant was required.

From a statement of the case it appears that the defendant was operating a soft-drink parlor and from the information set forth in the affidavit for search warrant, he was selling liquor from the kitchen. We have, therefore, a place of business where the public generally are invited.

From the testimony of Nash and Brown, no search was made of the premises and the jackass brandy and wine were under the table in the kitchen in plain sight.

Section 25, Title II of the National Prohibition Law, declares it to be unlawful to possess intoxicating liquor and further that no property rights shall exist in any such liquor.

Section 33 makes the possession of all liquor prima facie evidence that such liquor is kept for the pur-

pose of being sold, bartered, etc. Plaintiff in error, therefore, by having liquor in his possession was guilty of a violation of law. All the essential elements that make the offense were in plain view of officers.

It is elementary that a warrant for the arrest is not necessary where the crime is committed in the presence of an officer and further, if necessary, the officer making the arrest may seize the instruments which were used in the commission of the crime. Therefore, no search warrant was necessary for the seizure of the liquor found in plaintiff-in-error's saloon.

This Court, in the case of Benjamin, Catherine and James Sullivan vs. the United States, No. 3637, decided December 5th, 1921, held that a search warrant was not necessary for the search and seizure of intoxicating liquors and cited the case of Adams vs. the United States and Weeks vs. the United States.

In the case of the United States vs. Borkowski, 268 Federal, 408 (Montana), the Court held that the Federal Prohibition officers had a right to enter and search a house without a search warrant when it was ascertained by them through the sense of smell that intoxicating liquor was being manufactured upon the premises. This upon the theory that the officers had a right to arrest parties who committed a crime in their presence.

In the case of the United States vs. Murphy, 264 Federal, 842, it was determined by the Court that an officer had a right to search a person when making an arrest.

Judge Hand in the case of the United States vs.

Welch, 247 Fed. 239, sustained a search without a warrant, where the search was for the corpus of the crime and in this case Judge Hand distinguished the principle controlling in cases like the Weeks case and in cases where a search and seizure was made for the corpus of the crime, the Court said:

His counsel argues that under the cases of Weeks vs. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A., 1915B, 834, Ann. Cas. 1915C 1177, and Flagg vs. United States, 233 Fed. 481, 147 C. C. A. 367, the evidence thus procured could not be used against the defendant. I do not think the government can rest upon the proposition that it was not liable for the acts of McGinnis, because he was a private detective. Martin, the custom house guard, appears to have asked him to act for him while he was temporarily absent, and in the search he must be regarded as a government official *pro hac vice*.

But, assuming this to be the fact, the cases quoted do not apply to the present situation. They only go so far as to hold that private books and papers cannot be seized and used as incriminating evidence. The corpus delicti itself has not, I think, been held incapable of detention and production to establish the crime. If the defendant is right, testimony of a witness of a murder, though furnishing the only evidence, would be excluded, and the corpse could not be presented before the coroner's jury, if the witness discovered the murder by rushing into a house without a search warrant, where he heard cries of distress. Here the letter is in no real sense the property of the defendant, but is the very unlawful thing imported contrary to the statute.

I think the District Attorney is right in urging that any one could arrest the person carrying it.

who was thus committing a felony in his presence. To be sure, the man making the arrest did not know that a felony was being committed. He took the risk of civil and perhaps criminal actions for assault and battery if his suspicions turned out to be without foundation; but in this case it appears on the face of the indictment, and from the evidence adduced, that the suspicions were well founded, and the defendant was engaged in the commission of a felony. The constitutional safeguards against self-incrimination do not prevent the arrest of men engaged in the commission of crimes, or the seizure of property whereby the crime is being effected.

It is next contended by plaintiff in error:

(b) That the lower Court erred in refusing to entertain the motion to review the action of the United States Commissioner in denying the motion to quash the search warrant.

In answer to this contention it is respectfully urged that the District Court has no jurisdiction to review the action of the United States Commissioner in refusing to quash a search warrant. This for the reason that the United States Commissioner is an arm of the District Court and it will be just the same as asking the District Court to review its own decision.

(U. S. vs. Moresca, 266 Federal, 713).

It is also complained by Plaintiff in Error:

(c) That the lower Court erred in denying the motion to quash the search warrant made as an original motion in the District Court.

We respectfully submit, for the sake of argument, that this Court might hold that the affidavit upon

which the search warrant was issued was insufficient and that no right existed in the officers to search without a warrant and notwithstanding these findings this court would not be justified in reversing the case.

(1) That in all of the proceeding in the lower Court, up to the time of conviction, plaintiff in error made no showing that the guarantees given him by either the fourth or fifth Amendment to the Constitution of the United States were in any way violated in the seizure of intoxicating liquor upon the premises of the Alpine Winery. It is fundamental that the Court will not declare any proceedings, had with judicial sanction, void as infringing vested rights except at the instance of a party whose rights are violated or impaired. It will not consider the objection of one to the constitutionality of an act or proceeding by a party whose rights it does not affect and who has therefore no interest in defeating it.

(See *Estate of Sticknoth*, 7th Nev., 223;

State vs. Beck, 25th Nev. 68; 56 Pac. 1008).

So far as the record discloses the lower Court at no time was apprised by the plaintiff in error of the fact that his constitutional guarantees had been violated, it being simply presented to him in the form of an abstract principle of law. as the defendant made no claim or pretense at any stage of the hearing that the property seized was his or that the premises invaded were owned by him. In fact, that was the issue in the case as to the ownership of the liquor and of the premises. It was incumbent at all times upon the defendant in the Court below to show that

his constitutional rights were invaded and not those of some one else, who, so far as the court was concerned, may have been an absolute stranger to the proceedings. No showing, therefore, having been made by plaintiff in error that the officers took from him the intoxicating liquor, it must logically follow that it is not within his province now to complain that the seizure was unlawful.

It is next urged by Plaintiff in Error that the search warrant was illegal.

A reading of the transcript in this case establishes: That at no time in the lower Court did plaintiff in error urge that the search warrant in itself was insufficient. It was urged that the search warrant was insufficient because no valid affidavit was filed and this was the only objection urged in the lower Court to the sufficiency of the search warrant. We challenge counsel to point out to the Court any objection made by him in the lower Court attacking the sufficiency of the search warrant upon the grounds he now urges in this Court.

In conclusion we again invite the court's attention to the fact that the Plaintiff in Error was engaged in conducting a soft-drink parlor and that the record establishes without contradiction that the portion of the premises used as a kitchen was simply a blind for the sale of intoxicating liquors.

While every citizen is entitled to the rights and privileges given him under the constitution of the United States, it must become manifest to the ordinary man that the provision of the Constitution in reference to search warrants is being worked threadbare. It has been used as a smoke-screen to cover up and shield individuals who openly flaunt the

law in disposing of intoxicating liquors; when they are caught open-handed they have the audacity to come into Court and ask the Court to so construe the Constitution of the United States as to afford them protection; not only protection to them personally, but they request the Court to establish a doctrine which will declare immune from seizure the very corpus of the crime—the intoxicating liquor. We believe that the Constitution was framed, not for the benefit of the law-breaker, but for the protection of the innocent and the public.

We most earnestly urge that the judgment in this case should be affirmed.

Respectfully submitted,

M. A. DISKIN,

Asst. U. S. Attorney,

WILLIAM WOODBURN,

U. S. Attorney,

Attorneys for Defendant in Error.

8

United States
Circuit Court of Appeals
For the Ninth Circuit.

G. H. BACHENBERG,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Nevada.

Filed

JAN 18 1922

F. D. Monckton,

Clerk

No. 3723

United States
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Names and Addresses of Attorneys of Record.

Messrs. M. B. MOORE and C. H. McINTOSH,
Reno, Nevada,

For the Plaintiff in Error.

Honorable WM. WOODBURN, United States Attorney for the District of Nevada, Reno, Nevada, and Mr. M. A. DISKIN, Assistant U. S. Attorney for the District of Nevada, Reno, Nevada,

For the Defendant in Error.

In the District Court of the United States, in and
for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. H. BACHENBERG,

Defendant.

**Indictment for Violation of National Prohibition
Act.**

United States of America,
District of Nevada,—ss.

Of the February Term of the District Court of the United States of America, in and for the District of Nevada, in the year of our Lord, one thousand nine hundred and twenty-one.

The Grand Jurors of the United States of America, chosen, selected and sworn, within and for the District of Nevada, in the name and by the authority of the United States of America, upon their oaths, do find and present:

That J. H. Bachenberg, hereinafter called the defendant heretofore, to wit: On or about the 9th day of April, A. D. 1921, at Reno, Washoe County, State and District of Nevada, and within the jurisdiction of this Court, after the date upon which the 18th Amendment to the Constitution of the United States of America went into effect and before the finding of this Indictment, in violation of Section 3, Title II, of the Act of Congress dated October 28, 1919, known as the "National Prohibition Act," unlawfully, wilfully and knowingly had in his possession intoxicating liquors; [1*] said intoxicating liquors containing one-half of one per centum, or more, of alcohol by volume, and being fit for use for beverage purposes.

CONTRARY to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

WM. WOODBURN,

United States Attorney.

Names of witnesses examined before the Grand

Jury on finding the foregoing Indictment:

H. P. BROWN.

*Page-number appearing at foot of page of original certified Transcript of Record.

[Endorsed]: No. 5401. United States District Court, District of Nevada. The United States of America, vs. J. H. Bachenberg, Defendant. Indictment. A true bill, Miles E. North, Foreman. Filed this 25th day of April, A. D. 1921. E. O. Patterson, Clerk. Bail, \$1000.00. Wm. Woodburn, District Atty. [2]

In the United States District Court, District of
Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE BRACKENBURG,

Defendant.

Notice of Motion to Quash.

To the Above-named Plaintiff, and WILLIAM
WOODBURN, U. S. District Attorney for the
District of Nevada:

You, and each of you, will please take notice that on Wednesday, the 20th day of April, A. D. 1921, at the hour of 3 o'clock P. M., or as soon thereafter as counsel can be heard, that the above-named defendant will move the Commissioner, Anna M. Warren, at her office in the Washoe County Bank Building, in the City of Reno, Washoe County, Nevada, to quash, set aside and hold for naught the search-warrant issued by the said Anna M. Warren, United States Commissioner in and for the District

of Nevada, on the 9th day of April, A. D. 1921, and that said motion will be made and based on the grounds that there was no sufficient affidavit or deposition made, taken or filed with or before said Commissioner showing probable cause of any offense sufficient to warrant the issuance of said search-warrant. That there will be used upon the hearing of said motion the affidavit of P. Nash, made and filed before the said Anna M. Warren, Commissioner aforesaid, on the 9th day of April, 1921, upon which said search-warrant was issued; also [3] the oral testimony of P. Nash, and all of the files in said cause in said Commissioner's court.

Dated this 19th day of April, A. D. 1921.

MOORE & McINTOSH,

Attorneys for Defendant.

[Endorsed]: No. 5401. In the United States District Court, District of Nevada. United States of America, Plaintiff, vs. George Brackenburg, Defendant. Notice of Motion to Quash. Filed April 26, 1921. E. O. Patterson, Clerk. Moore & McIntosh, Attorneys at Law, Reno, Nevada. [4]

In the United States District Court, District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE BRACKENBURG,

Defendant.

Motion to Quash.

Comes now the defendant above-named and moves the Court to quash, set aside and hold for naught the search-warrant issued out of the above-entitled court by Anna M. Warren, one of the Commissioners of said court, on the 9th day of April, A. D. 1921, for the purpose of searching the premises at the corner of Center Street and Commercial Row in the City of Reno, County of Washoe, State of Nevada, known as the Palace Bar, and occupied by the above-named George Brackenberg, for the reason and on the grounds that no sufficient or legal affidavit was made or filed by any person before or with the said Commissioner prior to the issuance of said pretended search-warrant. That no witnesses were examined under oath before said Commissioner and no depositions taken in writing before the said Commissioner before the issuance of said search-warrant, and that no sufficient facts were presented to said Commissioner under oath by affidavit or otherwise, from which the said Commissioner could determine that probable cause existed for the issuance of said search-warrant.

Dated this 19th day of April, 1921.

MOORE & McINTOSH,
Attorneys for Defendant. [5]

[Endorsed]: No. 5401. In the United States District Court, District of Nevada. United States of America, Plaintiff, vs. George Brackenburg, Defendant. Motion to Quash. Filed April 26, 1921.

E. O. Patterson, Clerk. Moore & McIntosh, Attorneys at Law, Reno, Nevada. [6]

In the United States District Court for the State
of Nevada.

No. 5401.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE BACKENBURG,

Defendant.

**Notice of Motion for the Return of Property and
to Quash Search-warrant.**

To the Above-named Plaintiff, and WILLIAM
WOODBURN, U. S. District Attorney for the
District of Nevada.

You, and each of you, will please take notice that on Monday, the 2d day of May, A. D. 1921, at the hour of 10 o'clock A. M., or as soon thereafter as counsel can be heard, at the United States Federal Postoffice Building, in Carson City, Nevada, in the Courtroom of the said above-entitled District Court, in said building, and before the Honorable E. S. Farrington, Judge of said District Court, the above-named defendant will move the Court for an order directing the return to the said defendant, and to the premises at corner of Center Street and Commercial Row, City of Reno, Washoe County, Nevada, of one bottle containing liquor; and will also move the Court to quash the search-

warrant under which the said premises were searched and said seizure was made by the said officers, on the ground and for the reason as set out in the motion, a copy of which is attached hereto and served herewith; and that upon the hearing of said motion there will be used all of the files and records in said cause, both from the said Commissioner's [7] Court and in this court, and all proceedings had and taken before the said Commissioner; and the oral testimony of P. Nash and H. P. Brown, and the affidavit of said defendant, copy of which is served herewith.

Dated this 29th day of April, A. D. 1921.

MOORE & McINTOSH,
Attorneys for Defendant.

[Endorsed]: No. 5401. In the United States District Court for the State of Nevada. United States of America, Plaintiff, vs. George Backenburg, Defendant. Notice of Motion for the Return of Property and to Quash Search-warrant. Filed May 2, 1921. E. O. Patterson, Clerk. Moore & McIntosh, Attorneys at Law, Reno, Nevada. [8]

In the United States District Court for the State
of Nevada.

No. 5401.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE BACKENBURG,

Defendant.

Motion for the Return of Property and to Quash Search-warrant.

Comes now the defendant above named and moves the Court to return to defendant one bottle containing liquor; said bottle being seized by one P. Nash and H. P. Brown and others unknown to defendant on the 8th day of April, A. D. 1921, and taken from the premises at the corner of Center Street and Commercial Row in the City of Reno, Washoe County, Nevada, which said premises were then and at said time used and occupied by defendant; and also moves the Court to quash that certain search-warrant issued by Anna M. Warren, one of the Commissioners of this court, on or about the 9th day of April, A. D. 1921, upon an affidavit made and filed before said Commissioner by one P. Nash on the 9th day of April, A. D. 1921, for the reason and on the ground that the said search and seizure was made by said persons forcibly and in an unlawful manner, and without the service or notice to defendant that said officers were in possession of a search-warrant; and for the further reason that said search-warrant was illegal and void for the reason that no sufficient or legal affidavit was made or filed by the said P. Nash or any other person before or with the said Commissioner [9] prior to the issuance of said search-warrant; that no witnesses were examined under oath before said Commissioner and no depositions taken in writing before said Commissioner before the issuance of said search-warrant and that no sufficient facts were

presented to the said Commissioner under oath or by affidavit from which the said Commissioner could determine that probable cause existed that an offense was being committed by said defendant or had been committed by said defendant, or that said premises were being used or had been used for unlawful purpose or in violation of the National Prohibition Act, and that all of the acts of the said Commissioner and of the said Nash and Brown in the issuance of or in the service of or search of said premises and seizure of said described property was in violation of defendant's constitutional rights as provided under the Fourth Amendment to the Constitution of the United States, and that the retention of said liquors and the intended use thereof at the trial of defendant in the case now pending against him in this court will be in violation of defendant's constitutional rights as provided under the Fifth Amendment to the Constitution of the United States.

Dated this 29th day of April, A. D. 1921.

MOORE & McINTOSH,

Attorneys for Defendant.

[Endorsed]: No. 5401. In the United States District Court for the State of Nevada. United States of America, Plaintiff, vs. George Backenburg, Defendant. Motion for the Return of Property and to Quash Search-warrant. Filed May 2, 1921. E. O. Patterson, Clerk. Moore & McIntosh, Attorneys at Law, Reno, Nevada. [10]

Affidavit of George H. Bachenberg.

State of Nevada,
County of Washoe,—ss.

George Backenburg, being first duly sworn upon his oath deposes and says: That he is the owner and proprietor of a certain business room and house situate at the corner of Center Street and Commercial Row, in th City of Reno, Washoe County, Nevada, and was in possession thereof on the 9th day of April, A. D. 1921, and that on the evening of said date while defendant was on duty behind the counter in said place of business, one P. Nash and H. P. Brown, Federal Prohibition Enforcement officers in a forcible and violent manner entered affiant's place of business, leaping over the counter, seizing affiant and engaging in a struggle with affiant and overpowering him and overcoming him, and that said persons forcibly and unlawfully and without announcing that they were officers or that they were in possession of a search-warrant to search defendant's premises, and without serving any copy of any search-warrant, or other warrant upon defendant, and in an illegal manner searched said premises and seized and took in their possession, one bottle containing liquor, and not until said officers had so forcibly attacked defendant and so forcibly and unlawfully searched said premises and seized said property did the said officers or either of them present to affiant or any other person any search-warrant or other warrant.

Further affiant saith not.

GEO. H. BACHENBERG.

Subscribed and sworn to before me this 29th day of April, A. D. 1921.

[Seal]

M. B. MOORE,

Notary Public in and for Washoe County, State of Nevada. [11]

Defendant's Exhibit No. 1—Affidavit of P. Nash.

United States of America,

District of Nevada,—ss.

On this 9th day of April, 1921, before me, Anna M. Warren, a United States Commissioner in and for the District of Nevada at Reno, Nevada, personally appeared P. Nash, who being first duly sworn, deposes and says:

That he is and at all times herein mentioned was a Federal Prohibition Enforcement Agent in and for the District of Nevada, and as such makes this affidavit and sets forth the facts, circumstances and conditions hereinafter set forth that heretofore came to the knowledge of and were ascertained by affiant for the purpose of having issued hereon and hereunder a search-warrant; under and pursuant to the provisions of Title II of the Act of Congress approved October 28, 1919, known as the National Prohibition Act respecting the issuance of search-warrants, to search the following described premises, to wit: Premises on the corner of Center Street and Commercial Row in the City of Reno, County of Washoe, State of Nevada, known as the Palace Bar, occupied by John Doe Brockenburg.

That affiant has knowledge and information that in and upon the above-described premises, and since Title II of the said National Prohibition Act went into effect, to wit, after the first day of February, 1920, that intoxicating liquor containing one-half of one per cent or more of alcohol by volume was and is now being manufactured, sold, kept and stored, possessed and bartered, for and fit for beverage purposes, in violation of the said National [12] Prohibition Act and particularly of Section 21 of Title II of said act.

That the facts, circumstances and conditions of which affiant has knowledge and as ascertained by affiant are as follows, to wit: Direct information to affiant by a certain citizen of Reno, whom affiant has known for a long time and whom affiant believes to be absolutely truthful and reliable that liquor is being sold over the bar at said premises and that said informant purchased a drink there on this date; that affiant and agent H. P. Brown have watched said premises and on one occasion saw two parties coming away from said premises under the influence of liquor.

That it will be necessary to search the above-described premises in order to secure for the United States the said intoxicating liquor and apparatus and material for the manufacture of the same, and that it will be impossible to make the said search without the aid and use of a search-warrant, whereupon affiant prays that a search-warrant issue to enter the said premises and there to search for the said intoxicating liquor and apparatus and materials

for the manufacture of the same, pursuant to the statute in such case made and provided.

P. NASH.

Subscribed and sworn to before me this 9th day of April, 1921.

[Seal]

ANNA M. WARREN,
United States Commissioner.

[Endorsed]: No. 5401. U. S. District Court, District of Nevada. The United States vs. G. H. Bachenberg. Defts. Ex. 1. Filed May 2, 1921. E. O. Patterson, Clerk. [13]

[Endorsed]: No. 5401. In the United States District Court for the State of Nevada. United States of America, Plaintiff, vs. George Backenburg, Defendant. Affidavit. Filed May 2, 1921. E. O. Patterson, Clerk. Moore & McIntosh, Attorneys at Law, Reno, Nevada. [14]

SEARCH-WARRANT.

The President of the United States of America, to the United States Supervising Prohibition Enforcement Agent and to His Deputies or Any or Either of Them, GREETING:

WHEREAS, P. Nash, has heretofore, to wit, on the 9th day of April, 1921, filed with me, Anna M. Warren, a United States Commissioner in and for the District of Nevada at Reno, Nevada, in which he states that he is a Federal Prohibition Enforcement Agent in and for the District of Nevada, working under the United States Supervising Prohibition Enforcement Agent at San Francisco, Cali-

fornia; that in and upon those certain premises situate as follows, to wit: Premises on the corner of Center Street and Commercial Row in the City of Reno, County of Washoe, State of Nevada, known as the Palace Bar, occupied by John Doe Brockenburg, that affiant has knowledge and information that in and upon the above described premises there is located and concealed, stored and kept, sold, possessed and bartered and fit for beverage purposes intoxicating liquor containing one-half of one per centum or more alcohol by volume, in violation of the National Prohibition Act and particularly of section 21 of Title II of the said Act.

That it will be necessary to search the above described premises in order to obtain for the United States Government the said intoxicating liquor, and that it will be impossible to make the above mentioned search without the aid and use of a search-warrant, whereupon affiant prays that a search-warrant issue, covering the above-described premises and each and every building on said premises. [15]

NOW, THEREFORE, pursuant to Section 25, Title II of the said National Prohibition Act you are hereby authorized and empowered to enter the above-described premises in the daytime or in the night-time and each and every building on said premises and there to search for the above-mentioned intoxicating liquor which is concealed in violation of the National Prohibition Act, and to seize the said liquor and take the same into your

possession to the end that the said liquor may be dealt with according to law, and to make due return hereof, with a written inventory of the property seized by you or either of you without delay.

WITNESS my hand this 9th day of April, 1921.

ANNA M. WARREN,
United States Commissioner.

[Endorsed]:

Reno, Nev. April 10th, '21.

Make return on within warrant as follows:

Searched premises described within on April 9th,
7:55 P. M.

Seized bottle containing liquor from behind bar.

Arrested proprietor, Geo. H. Bachenberg, who was behind bar at time search was made.

I, P. Nash, the officer serving the within warrant, hereby certify on oath, that the above inventory represents all the property taken under the warrant.

P. NASH, Fed. Pro. Agt. [16]

In the District Court of the United States for the
District of Nevada.

No. 5401.

THE UNITED STATES

vs.

C. H. BACHENBERG.

Verdict.

We, the jury in the above-entitled cause, find

the defendant guilty as charged in the indictment.

Dated May 7th, 1921.

ALFRED MERRITT SMITH,
Foreman.

[Endorsed]: No. 5401. U. S. District Court, District of Nevada. The United States vs. G. H. Bachenberg. Verdict. Filed May 7th, 1921. E. O. Patterson, Clerk. [17]

INDICTMENT FOR VIOL. NATIONAL PRO-
HIBITION ACT.

No. 5401.

THE UNITED STATES

vs.

J. H. BACHENBERG.

**Minutes of Court—April 25, 1921—Order for Issu-
ance of Capias.**

The grand jury having this day presented a true bill of indictment in this case, it is ordered that a *capias* issue herein returnable forthwith, and that when apprehended, the defendant may be admitted to bail upon giving a good and sufficient bond in the sum of \$1000.00. [18]

INDICTMENT FOR VIOL. NATIONAL PRO-
HIBITION ACT.

No. 5401.

THE UNITED STATES,

Plaintiff,

vs.

J. H. BACHENBERG,

Defendant.

Minutes of Court—April 27, 1921—Arraignment.

This defendant appeared this day with his attorney, Mr. M. B. Moore and was duly arraigned upon the said indictment as provided by law. He declared his true name to be *G. H. Bachenberg* and was granted until Monday next, at 10 A. M. to enter his plea. Upon motion of Mr. Moore, consented to by Mr. Diskin, Asst. U. S. Attorney, it is ordered that the defendant be released upon giving a good and sufficient bond in the sum of One Thousand Dollars, to be approved by A. M. Warren, U. S. Commissioner, before 5 o'clock P. M. of this day, to insure his appearance in this Court when so required.

INDICTMENT FOR VIOL. NATIONAL PRO-
HIBITION ACT.

No. 5401.

THE UNITED STATES,

Plaintiff,

vs.

J. H. BACHENBERG,

Defendant.

Minutes of Court—May 2, 1921—Petition for Return of Property and Motion to Quash.

Mr. M. B. Moore, attorney for the defendant herein, presented, read and argued his petition for the return of certain seized property, and his motion to quash search-warrant. During his argument he presented the affidavit for and the search-warrant used at [19] the time of the seizure, the same were admitted and ordered marked Defts. Ex. No. 1; Mr. M. A. Diskin, Assistant U. S. Attorney, argued in opposition to the petition and motion. At the conclusion of the arguments the matters were ordered submitted.

INDICTMENT FOR VIOL. NATIONAL PROHIBITION ACT.

No. 5401.

THE UNITED STATES,

Plaintiff,

vs.

G. H. BACHENBERG,

Defendant.

Minutes of Court—May 3, 1921—Order Denying Petition for Return of Property and Motion to Quash.

Ordered that the petition for the return of certain seized property and the motion to quash be, and the same are hereby, denied. To which ruling Mr. M. B. Moore, attorney for defendant, asked and was granted the benefit of an exception.

INDICTMENT FOR VIOL. NATIONAL PRO-
HIBITION ACT.

No. 5401.

THE UNITED STATES,

Plaintiff,

vs.

G. H. BACHENBERG,

Defendant.

Minutes of Court—May 7, 1921—Trial.

This cause coming on regularly for trial this day; Mr. M. A. Diskin, Assistant U. S. Attorney, appeared on behalf of the plaintiff; Mr. M. B. Moore for the defendant, who was also present, and who entered his plea of not guilty at this time. [20] The following named jurors were accepted by the parties and duly sworn to try the issue, to wit: Wm. Byers, Geo. B. Spradling, Clarence Reudy, John Cosser, Chas. L. Fulstone, John T. Brady, Geo. J. Robsen, E. M. Sullivan, Henry P. Karge, Alfred M. Smith, Chas. J. McGuigan and E. H. Bath. The indictment was read to the jury by the clerk and the plea of the defendant stated. Mr. Diskin waived opening statement on behalf of plaintiff. Mr. Moore at this time objected to any testimony sought to be introduced by the Government for the reason that the evidence was seized upon an unlawful search-warrant. Motion denied and exception allowed. The following named witnesses were duly sworn and testified in support of

the indictment, viz.: H. P. Brown, P. Nash and S. C. Dinsmore; during which testimony a bottle partially filled with liquor was introduced in evidence, ordered admitted, filed and marked "Plffs. Ex. No. 1"; plaintiff rests. No testimony was offered on the part of defendant. Mr. Diskin made his opening argument to the jury, the defendant waived argument, and the jury having been first instructed by the Court, retired in charge of the Marshal to deliberate on the case. No exceptions were taken to the Court's instructions. At 11:50 A. M. the jury returned into court with the following verdict, viz.; "In the District Court of the United States for the District of Nevada. The United States vs. G. H. Bachenberg. No. 5401. We, the jury in the above-entitled cause, find the defendant guilty as charged in the indictment. Dated May 7th, 1921. Alfred Merritt Smith, Foreman," and so they all say. Thereupon it was ordered that the defendant appear for sentence on Tuesday, the 17th instant at ten o'clock A. M. His present bond was deemed sufficient. [21]

INDICTMENT FOR VIOL. NATIONAL PRO-
HIBITION ACT.

No. 5401.

THE UNITED STATES,

Plaintiff,

vs.

G. H. BACHENBERG,

Defendant.

Minutes of Court—May 13, 1921—Order Continuing Passing of Sentence.

Upon motion of Mr. M. B. Moore, consented to by the U. S. Attorney, it is ordered that the passing of sentence in this case be, and the same is hereby, continued until the 27th instant, at ten o'clock A. M.

INDICTMENT FOR VIOL. NATIONAL PROHIBITION ACT.

No. 5401.

THE UNITED STATES,

Plaintiff,

vs.

G. H. BACHENBERG,

Defendant.

Minutes of Court—May 27, 1921—Order Continuing Passing of Sentence.

Upon motion of Mr. M. B. Moore, attorney for the defendant herein, and good cause appearing therefor, it is ordered that the time for passing sentence in this case be, and the same is hereby, continued until Monday, June 6th, next. [22]

INDICTMENT FOR VIOL. NATIONAL PRO-
HIBITION ACT.

No. 5401.

THE UNITED STATES,

Plaintiff,

vs.

G. H. BACHENBERG,

Defendant.

Minutes of Court—June 6, 1921—Sentence.

At this time defendant's motion for a new trial was denied by the Court, and the following sentence was pronounced upon the defendant, who was present with his attorney, Mr. M. B. Moore: It is ordered that the defendant pay to the United States a fine of \$500.00 and that he stand committed to the care of the marshal until the fine and costs incurred herein are paid.

INDICTMENT FOR VIOL. NATIONAL PRO-
HIBITION ACT.

No. 5401.

THE UNITED STATES,

Plaintiff,

vs.

G. H. BACHENBERG,

Defendant.

Minutes of Court—June 6, 1921—Petition for and Order Allowing Writ of Error.

On this 6th day of June, A. D. 1921, came the defendant, G. H. Bachenberg, by his attorneys, Messrs. Moore & McIntosh, and filed herein and presented to the Court his petition praying for the allowance of a writ of error and assignment of errors intended to be used by him, praying also that a transcript of the record, testimony, exhibits, stipulations, proceedings and papers duly authenticated, may be sent to the United States Circuit [23] Court of Appeals for the Ninth Circuit; and that such other and further proceedings may be had as may be proper in the premises. IN CONSIDERATION WHEREOF, the Court allows a writ of error, upon the defendant, G. H. Bachenberg, giving a bond according to law in the sum of Two Thousand Dollars (\$2,000.00), which shall operate as a supersedeas bond, and that upon the accepting, filing and approval of said bond, the said defendant shall be and he is hereby ordered to be released from custody.

Done in open court, June 6th, 1921.

INDICTMENT FOR VIOL. NATIONAL PROHIBITION ACT.

No. 5401.

THE UNITED STATES,

Plaintiff,

vs.

G. H. BACHENBERG,

Defendant.

Minutes of Court—June 7, 1921—Order Fixing Costs.

Upon stipulation of counsel herein, it is ordered that the costs in this case are hereby fixed at \$52.00.
[24]

INDICTMENT FOR VIOL. NATIONAL PROHIBITION ACT.

No. 5401.

THE UNITED STATES

vs.

J. H. BACHENBERG.

Minutes of Court—July 6, 1921—Order Extending Time to File Papers in U. S. C. C. A.

Good and sufficient cause appearing therefor, it is ordered that the defendant herein be, and he hereby is, granted thirty days from and after this dated within which to file his papers on appeal in the United States Circuit Court of Appeals for the Ninth Circuit. [25]

In the District Court of the United States for the
District of Nevada.

May Term, 1921.

Honorable E. S. FARRINGTON, Judge.

No. 5401.

**VIOLATION OF NATIONAL PROHIBITION
ACT.**

UNITED STATES OF AMERICA

vs.

G. H. BACHENBERG.

Judgment.

This being the time heretofore appointed for passing sentence in this case, the Court pronounced judgment as follows, addressing the defendant:

You, G. H. Bachenberg, have been indicted by the Grand Jury, impaneled in and by this court, for the crime of violating the National Prohibition Act by unlawfully, willfully and knowingly having in your possession intoxicating liquors, said intoxicating liquors containing one-half of one per centum, or more, of alcohol by volume, and being fit for use for beverage purposes; said crime having been committed on the 9th day of April, 1921 at Reno, Washoe County, State and District of Nevada, and within the jurisdiction of this court. You were duly arraigned upon that indictment, as required by law, and on being called upon to plead thereto you pleaded not guilty. At a subsequent

day you were placed on trial, by a jury of your own selection, and by the verdict of that jury you were found guilty as charged in the indictment. The defendant was then asked if he had any legal cause to show why the judgment of the Court should not now be pronounced against him. To which he replied that he had not.

In consideration of the law and the premises, it is hereby **ORDERED AND ADJUDGED** that you pay to the United States a fine of Five Hundred (\$500.00) Dollars and costs, and that you stand committed to the care of the marshal until the said fine and costs, taxed at \$——, are paid.

Dated and entered, June 6, 1921.

Attest: E. O. PATTERSON,
Clerk. [26]

In the United States District Court for the District
of Nevada.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GEORGE BACHENBERG,
Defendant.

Praeipie for Transcript of Record.

To E. O. Patterson, Clerk U. S. District Court,
Carson City, Nev.

We hereby request that you have prepared for us copies of the records in the case of the United States vs. George Bachenberg, as follows:

1. Copies of proceedings before the United States Commissioner, Anna M. Warren, including:

- (a) Affidavit for search-warrant.
- (b) Search-warrant.
- (c) Notice of motion to quash search-warrant.
- (d) Motion to quash search-warrant.
- (e) Copy of all testimony taken before said Anna M. Warren, certified, up to the District Court on said motion.
- (f) Copy of any other papers or proceedings not included in the above had or taken before the said Commissioner.

2. Copy of motion made and filed in the United States District Court for the District of Nevada, renewing in said Court the motion made before the Commissioner.

- (a) Copy of notice of motion for the return of property taken under search-warrant.
- (b) Copy of motion for the return of property made and filed in said cause in said U. S. District Court. [27]
- (c) Copy of minutes of clerk of court showing the Court's ruling upon all motions and objections.
- (d) Copy of indictment.
- (e) Complete transcript of testimony and notes taken by stenographer in said cause.
- (f) Copy of verdict of jury.
- (g) Copy of motion for new trial.
- (h) Copy of petition for writ of error.
- (i) Copy of order allowing writ of error.
- (j) Copy of assignment of errors.

- (k) Copy of citation.
- (l) Copy of supersedeas bond.
- (m) Copy of cost bond.

MOORE & McINTOSH,
Attorneys for Defendant.

[Endorsed]: No. 5401. In the United States District Court for the District of Nevada. United States of America, Plaintiff, vs. George Bachenberg, Defendant. Praecipe. Filed June 11, 1921. E. O. Patterson, Clerk. Moore & McIntosh, Attorneys at Law, Reno, Nevada. [28]

In the District Court of the United States, in and
for the District of Nevada.

No. 5401.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
G. H. BACHENBERG,
Defendant.

Motion for New Trial.

Comes now the defendant above named and moves the Court that a new trial be granted for the following reasons, and on the following grounds, to wit:

1st. That the Court erred in its decision upon questions of law arising during the course of the trial.

2d. That the verdict of the jury is contrary to law.

MOORE & McINTOSH,
Attorneys for Defendant.

[Endorsed]: No. 5401. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. J. H. Bachenberg, Defendant. Motion for New Trial. Filed June 6th, 1921. E. O. Patterson, Clerk. Moore & McIntosh, Attorneys at Law, Reno, Nevada. [29]

In the District Court of the United States, in and
for the District of Nevada.

No. 5401.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
G. H. BACHENBERG,
Defendant.

Assignment of Errors.

Comes now the defendant above named, G. H. Bachenberg, and files the following assignment of errors upon which he will rely upon his prosecution of the writ of error in the above-entitled cause from the judgment made and entered by this Honorable Court on the 6th day of June, A. D. 1921.

I.

That the United States District Court for the District of Nevada erred in denying defendant's

motion for new trial made in the above-entitled court and cause on the 6th day of June, 1921, and before the judgment of sentence was pronounced.

II.

That the said Court erred in overruling defendant's objection to the introduction of testimony, made after the jury was impaneled and sworn to try said cause, and before any testimony as to the facts was introduced at said trial.

III.

That the said Court erred in overruling defendant's objection [30] to the admission of the testimony of the witness H. P. Brown, as to what he saw, found and did under the search-warrant referred to in the motion for the return of property made and filed in said cause before the date on which said cause came to trial, said testimony referred to, with questions and answers as follows, to wit:

Q. What, if anything, took place after you went in?

Mr. MOORE.—If the Court please, I do not wish to renew my objection to all these questions, so may it be understood that my objection goes directly now to what took place on the part of this witness, and what he did, and what he found there, so I need not interrupt?

The COURT.—It will be so understood, and you may have an exception.

A. We entered the premises about eight o'clock, and Mr. Bachenberg was down at the end of the bar when we entered, and when he

saw us come in the door he made a run for this end of the bar.

Mr. DISKIN.—(Q.) That is, the front end of the bar?

A. The front end of the bar; and I jumped over the bar and caught him as he was coming by, and he made a kick at the bottle which was on the floor alongside of a hole, and he kicked the bottle over, but it didn't go down the hole; he and I had a little tussle there, and he went to the floor, and Mr. Nash came over, and Mr. Nash stated to me to let him up, that he had destroyed the evidence; when I let him up he made a run for the hole in the floor, and the bottle was about four feet then from the hole in the floor, and he stamped on the bottle, and tried to destroy the evidence; and I grabbed him again and pulled him away from there, and he hollered at one of the outsiders, outside of the bar, to jump over [31] the bar and destroy that evidence, and the party that he hollered to made an effort to jump over the bar, and was stopped by one of the outside officers, the chief of police.

Q. You say there was a hole back of the bar?

A. Yes, sir. I should judge about ten inches square, in the floor leading down to the cellar.

Q. And how far was the bar from this hole, would you say?

A. From the bar, it was right underneath the bar, the back-bar, or the drain-board, rather.

Q. It was near the drain-board?

A. Yes, sir, underneath the drain-board.

Q. With reference to whether or not this hole was in the center of the bar, what would you say?

A. Well, it was more toward the end of the bar, a little over the average would be toward the end of the bar, toward the office.

Q. Did you make any investigation of the portion of the cellar under the hole?

A. Yes, sir.

Q. And what, if anything, did you see?

A. There was a large pile of rocks right directly under the hole in the floor.

Q. Now, you say when you went in there first Mr. Bachenberg was down at the end of the bar?

A. At the further end of the bar, serving some drinks down there.

Q. And you jumped over the bar immediately, did you?

A. Not till he made a run to come up toward this end of the bar; then I jumped over and met him.

Q. In that effort that you made, would you say it was a run or a fast walk?

A. A run. [32]

Q. And where did you after that locate the bottle?

A. On the floor, about four feet from the hole, lying on its side.

Q. Do you know what became of the bottle?

A. Yes, sir; Mr. Nash picked the bottle up.

Q. How long do you think you tussled with the defendant?

A. Oh, I don't know; about fifteen or twenty seconds. I had two tussles with him.

Q. You let him up after the first tussle?

A. Mr. Nash said that he had destroyed the evidence, and I let him up, and he made a run then for the bottle, and tried to destroy it with his feet.

Q. What sort of an effort did he make with his feet?

A. Jumped on top of the bottle two or three times; then I pulled him away from it, and told Mr. Nash to get the bottle.

Q. What you have testified to occurred at Reno, Washoe County, Nevada, did it?

A. Yes, sir.

Mr. DISKIN.—Cross-examine.

IV.

That the said Court erred in overruling defendant's objection to the testimony of P. Nash as to what he saw, found and did under the search-warrant referred to in the motion for the return of property made and filed in said cause before the date on which the said cause came to trial, said testimony referred to with questions and answers, as follows:

Q. Was anyone in there at that time?

A. Yes, sir; possibly—I think there must have been twenty or thirty people at least; the lower end of the bar, there were at least— [33]

Mr. MOORE.—Just a moment. If the Court

please, in order that I may have my record correct, I object to any testimony on the part of this witness as to what he did or what he saw, basing my objection on the same grounds I have hitherto stated in the objection to the testimony of the other witness, and the general objection to the introduction of any testimony.

The COURT.—It will be the same ruling, and the same exception.

WITNESS.—(Contg.) Four or five customers, I presume, standing in front of the bar. When I say the lower end of the bar I mean the end of the bar next to Commercial Row.

Mr. DISKIN.—(Q.) Where was the defendant?

A. He was at the upper end of the bar.

Q. What, if anything, did you do after you entered the place?

A. Why, I tried—the first thing that we saw when we saw the defendant, he recognized us.

Mr. MOORE.—I object to that, that “he recognized us,” as a conclusion of the witness.

The COURT.—That may go out.

WITNESS.—As we came in the door, the first notice that we saw the defendant was his quick actions, leaving the place where he was serving a customer at the upper end, and starting down toward the lower end of the bar, on a run. Due to the fact that there was these parties in front of the bar I spoke of, we had quite a little—it was quite hard for us to get over

the bar; in fact, I made two endeavors on my own part to get over before I got over the bar.

Mr. DISKIN.—(Q.) Who went over the bar first, you or Mr. [34] Brown?

A. Brown went over the bar first; I was hindered from going over; I made two tries, and then I lit on my head, I think.

Q. When Mr. Brown got over where was the defendant?

A. He was running down the inside.

Q. On the inside of the bar? A. Yes.

Q. What happened after Brown got over the bar?

A. Brown and the defendant met—oh, I don't know, two or three or four feet from where this hole was, where the bottle was; and when I got to my feet I looked where this bottle was, in the expectation of seeing the bottle, and I didn't see it there; Mr. Brown had the defendant, grappling with him at that time, and they were mixed in behind the bar there; in fact, I believe they were down on the floor, both of them; I am not positive of that, either that or very near the floor; I told Brown to let him up, that the evidence was gone; I gave one look at this hole and didn't see any bottle; and I said, "Let him up, the evidence is gone"; and Brown released him, and without saying a word he brushed past me, and started to stamp on this bottle, and we both of us together grappled him at that time, but I released him and tried to pick up the bottle.

Q. Where did you first see the bottle?

A. Laying on the floor, flat, not standing up, but laying on the floor flat, and possibly from four to six feet away from where the hole was.

Q. Now, in this second tussle did you hear the defendant make any remark of any kind?

A. Yes, sir; I heard him call out two or three times, "Jump over the bar and break the bottle," or words to that effect; or "Come over the bar and break the bottle"; the idea was, of course, that [35] he was calling to somebody on the outside of the bar to destroy the evidence.

Mr. MOORE.—I move that be stricken out, after the word "idea."

The COURT.—That may go out.

Mr. DISKIN.—No objection.

The COURT.—Just the last part of it, the idea.

Mr. DISKIN.—(Q.) Did you examine that hole? A. Yes, sir.

Q. How large a hole was it?

A. Oh, I should judge around ten inches square, something in that nature.

Q. And where was it in reference to the drain-board?

A. Oh, the drain-board, right directly—in close proximity to the drain-board; I would not like to say as to the number of inches, or anything of that nature; the only time I ever saw it was that night; I didn't measure it with a tapeline, or anything of that kind.

Q. Did you make any investigation of the cellar or basement? A. I did.

Q. What, if anything, did you find in this hole?

A. Directly under this hole was a locked compartment or room, possibly eight or ten feet square, with a padlocked door; the defendant opened this door with his key, and in this compartment was this pile of rocks directly under the hole.

Q. What became of the bottle, Mr. Nash, which you have testified to, or saw in the defendant's premises?

A. I took it in my possession; sealed it at the police station, put the seal on it and labeled it, and then delivered it personally to Professor Dinsmore that evening. [36]

Q. Prior to the time you took the bottle and delivered it to Professor Dinsmore, was it always in your possession?

A. Either in my possession, or Mr. Brown's.

Q. Would you be able to identify the bottle?

A. I would.

Q. Will you examine that bottle and its contents? (Hands to witness.)

A. That is the same bottle, with my writing on it, on the label, with my initials and Mr. Brown's initials. I know it by the label; know it also by the fact of this seal that was placed on it that evening; the wax seal we placed on it underneath Professor Dinsmore's seal.

Q. From the time you received that bottle

until you delivered it to Professor Dinsmore, did you put anything in the bottle?

A. I did not.

Q. And the substance that was in the bottle at the time you seized it and at the time you delivered it to Professor Dinsmore was absolutely the same?

A. Absolutely. I did taste the liquor in the bottle, I think it was in the police station; but at no time had the bottle been out of our custody. I tasted it up there; it was liquor.

Q. You are familiar with the taste of liquor?

A. I am.

Q. From the examination you made of the contents of this bottle, can you say whether this was liquor, or not?

A. I can swear that is some sort of whiskey.

Mr. DISKIN.—I offer the bottle in evidence.

Mr. MOORE.—Object on the same grounds we have heretofore imposed to all this line of testimony, if the Court please.

The COURT.—It will be the same ruling and the same exception.

Mr. DISKIN.—Cross-examine. [37]

V.

That the said Court erred in refusing to permit counsel for the defendant to inquire of the said Percy Nash as to his actual knowledge of the alleged facts and statement made in the affidavit upon which the said search-warrant is based, as appears from the transcript as follows, to wit:

Q. And you had prior to that time, had you—

The COURT.—I don't know about going into this thing. I have already pronounced that search-warrant valid; and if there is any mistake, it is my mistake, and not a matter that the jury can pass on now.

Mr. MOORE.—I am quite well aware of that fact, if the Court please; and I will state clearly that the only purpose I have in going into this matter at this time, is for the purpose of my record, and as the basis, further, of making a motion in a few minutes, after I have completed Mr. Nash's cross-examination. I will state to your Honor, so it will save time—I don't think it will prejudice the jury at all—that the question I wish to ask him is as to whether or not this other instrument I hold is the affidavit that he made before Mrs. Warren, which is the basis of this search-warrant, and whether or not it is the only affidavit that he made.

The COURT.—You brought this matter up on motion, and the petition was filed, was it not? At any rate, the proceeding was brought before me, and you had ample opportunity then to introduce any evidence you wished. I passed on the matter, and held that the warrant was good. Now if the testimony is introduced before the jury, what shall I instruct the jury? Shall I [38] instruct them they are now to pass on the same question I have already passed on? Are they to determine whether this is a valid

warrant or not, and whether there was probable cause? Under any theory of the case I don't think that can come before the jury at this time; and, furthermore, under the Weeks case and the Adams case, it is hardly proper to stop in the course of a trial to determine whether the search-warrant is regular or not, particularly after the matter has been gone into before the trial, and counsel have had opportunity to have it determined.

Mr. MOORE.—As I stated, the only purpose of this cross-examination was for the basis of a motion, which is to strike the testimony of both these witnesses from the record, and all of it, relative to the search and seizure made there.

The COURT.—I don't think I shall permit it now. You have had your opportunity already, and I do not think we can stop to go into those matters now.

Mr. MOORE.—We reserve an exception to the Court's ruling.

The COURT.—You may have the exception. If this were the only case where that question would come up, possibly I would permit it, but there are a great many cases of this kind; and if the question is to be tried once before the Judge and another time before the jury, it is going to take a great deal of time, and I do not like to set the precedent. Counsel will always have ample opportunity before the trial to raise all those questions, and they can be passed on by the Court. The question has been raised

already; it is one purely for the Judge to pass on, and not for the jury, and the rule hereafter will be that all [39] questions of that kind must be disposed of before the trial.

Mr. MOORE.—Well, I will state to the Court, that the Court has disposed of them with the exception of this one.

The COURT.—You had ample opportunity to bring it up before.

Mr. MOORE.—I could not bring it up on motion to strike the testimony out.

The COURT.—You have had ample opportunity to bring out all these facts, every one of them, on the question as to whether there was probable cause or not. I, however, do not wish to be understood as saying that the motion and the papers that were presented were sufficient to bring up all those questions, but there was no reason why you should not have brought them all up.

Mr. MOORE.—I think that is all.

VI.

That the said Court erred in overruling defendant's motion to strike out the testimony of the witness Nash and the witness Brown, said motion being as follows, to wit:

Mr. MOORE.—Now, if the Court please, in order to have my record complete as I view it, I move that the testimony of Mr. Brown and Mr. Nash relative to what occurred in the premises this evening at the time they made the search be stricken from the record, for the

reason it now appears that it was secured in an unlawful and illegal manner, basing my motion upon the files and records in this case, and upon the testimony now given by the officers.

The COURT.—The motion is overruled, and you may have an exception. [40]

Mr. MOORE.—We note an exception.

VII.

That the said Court erred in overruling defendant's objection to the testimony of S. C. Dinsmore, witness for the Government, said objection being as follows, to wit:

Mr. MOORE.—Just a moment. If the Court please; I object to any testimony from this witness relative from whom he received that bottle, or as to what he did with it, or in any connection, basing it upon the motions and objections heretofore made.

The COURT.—It will be the same ruling and same objection. Proceed.

VIII.

That the Court erred in overruling defendant's motion made in said cause, in which the defendant renewed the motion made before the Commissioner, Anna M. Warren, to quash, set aside and hold for naught the search-warrant issued by Anna M. Warren on the 9th day of April, A. D. 1921.

IX.

That the said Court erred in overruling defendant's motion and offer of testimony made in this cause to quash the search-warrant issued by Anna M. Warren, United States Commissioner, in and

for the District of Nevada, on the 9th day of April, A. D. 1921, and for the return to the defendant of the property taken under said search-warrant for the reasons stated in said motion and also to the offer of testimony made by the defendant upon the hearing of said motion.

BY REASON WHEREOF, plaintiff in error prays that the judgment aforesaid be reversed and the cause remanded to the [41] trial court with instructions to the trial court to quash the search-warrant in said action and for such other and further proceedings as may be proper in the premises.

Respectfully submitted:

MOORE & McINTOSH,

Attorneys for Defendant.

[Endorsed]: No. 5401. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. J. H. Bachenberg, Defendant. Assignment of Errors. Filed June 6, 1921. E. O. Patterson, Clerk. Moore & McIntosh, Attorneys at Law, Reno, Nevada. [42]

In the District Court of the United States, in and
for the District of Nevada.

No. 5401.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

G. H. BACHENBERG,

Defendant.

Petition for Writ of Error.

To the Honorable E. S. FARRINGTON, Judge of
the District Court of the United States, for the
District of Nevada.

Now comes G. H. Bachenberg, the defendant in
the above-entitled cause, and feeling himself ag-
grieved by the verdict of the jury and the judgment
of the District Court of the United States for the
District of Nevada, made and entered on the 6th
day of June, A. D. 1921, hereby petitions for an
order allowing him, said defendant, to prosecute a
writ of error to the United States Circuit Court of
Appeals of the Ninth Circuit from the District
Court of the United States for the District of
Nevada, and also prays the Court that a transcript
of the record, testimony, exhibits, stipulation, pro-
ceedings and papers, duly authenticated, may be
prepared and sent to the United States Circuit
Court of Appeals for the Ninth Circuit, and that
said writ of error may be made a supersedeas and
that your petitioner be released on bail in an amount
to be fixed by the Judge of said District Court
pending the final disposition of said writ of error.
[43]

Assignment of errors is filed with this petition.

MOORE & McINTOSH,

His Attorneys.

[Endorsed]: No. 5401. In the District Court of
the United States, in and for the District of Nevada.
United States of America, Plaintiff, vs. J. H. Bach-

enberg, Defendant. Petition for Writ of Error. Filed June 6, 1921. E. O. Patterson, Clerk. Moore & McIntosh, Attorneys at Law, Reno, Nevada. [44]

In the District Court of the United States, in and
for the District of Nevada.

No. 5401.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

G. H. BACHENBERG,

Defendant.

Order Allowing Writ of Error.

On this 6th day of June, A. D. 1921, came the defendant, G. H. Bachenberg, by his attorneys, Messrs. Moore & McIntosh, and filed herein and presented to the Court his petition praying for the allowance of a writ of error and assignment of errors intended to be used by him, praying also that a transcript of the record, testimony, exhibits, stipulations, proceedings and papers, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit; and that such other and further proceedings may be had as may be proper in the premises.

IN CONSIDERATION WHEREOF, the Court allows a writ of error, upon the defendant, G. H. Bachenberg, giving a bond according to law in the sum of Two Thousand Dollars (\$2,000.00) which

shall operate as a supersedeas bond, and that upon the accepting, filing and approval of said bond, the said defendant shall be and he is hereby ordered to be released from custody.

Done in open court this 6th day of June, A. D. 1921.

E. S. FARRINGTON,

District Judge. [45]

[Endorsed]: No. 5401. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. J. H. Bachenberg, Defendant. Order Allowing Writ of Error. Filed June 6, 1921. E. O. Patterson, Clerk. Moore & McIntosh, Attorneys at Law, Reno, Nevada. [46]

In the District Court of the United States, in and for the District of Nevada.

No. 5401.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

G. H. BACHENBERG,

Defendant.

Bail Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, J. H. Bachenberg, of the County of Washoe, State of Nevada, as principal, and Sam Pickett, and Bert Baroni, of the County of Washoe, State of Nevada, as sureties, are held and firmly

bound unto the United States of America, in the full and just sum of Two Thousand Dollars (\$2000.00), to be paid to the United States of America, to which payment well and truly *be* made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 6th day of June, in the year of our Lord, one thousand nine hundred and twenty-one.

WHEREAS, lately on the 6th day of June, A. D. 1921, at a term of the District Court of the United States for the District of Nevada, in a cause pending in said court between the United States of America, plaintiff, and G. H. Bachenberg, defendant, a judgment and sentence was rendered against said defendant as follows, to wit:

The said G. H. Bachenberg to be fined in the sum of Five [47] Hundred Dollars (\$500.00), together with costs of suit.

WHEREAS, the said G. H. Bachenberg obtained a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to the said United States District Court for the District of Nevada, to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing the United States of America to be and appear in the said court 30 days from and after the date thereof, which citation has been fully served.

Now, the condition of said obligation is such, that if the said G. H. Bachenberg shall prosecute said writ of error to effect, and shall appear in person

in the United States Circuit Court of Appeals for the Ninth Circuit, when said cause is reached for argument or when required by law or rule of said court, and from day to day thereafter in said court until such cause shall be finally disposed of, and shall abide by and obey the judgment and all orders made by the said Court of Appeals, in said cause, and shall surrender himself in execution of the judgment and sentence appealed from, as said Court may direct, if the judgment and sentence against him shall be affirmed, and if he shall appear for trial in the District Court of the United States for the District of Nevada, on such day or days as may be appointed for a retrial by said District Court and abide by and obey all orders of said Court, provided the judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals, then the above obligation to be void; otherwise to remain in full force, virtue and effect. [48]

GEO. H. BACHENBERG, (Seal)
Principal.

S. M. PICKETT, (Seal)
Surety.

BERT BARONI, (Seal)
Surety.

State of Nevada,
County of Washoe,—ss.

S. M. Pickett and Bert Baroni, sureties on the annexed foregoing undertaking, being first duly sworn, each for himself and not one for the other, deposes and says: That he is a resident and free-

holder within the County of Washoe, State of Nevada; and that he is worth the sum of Two Thousand Dollars (\$2000.00) over and above all his just debts and liabilities, in property not exempt from execution.

S. M. PICKETT.
BERT BARONI.

Subscribed and sworn to before me this 6th day of June, 1921.

[Seal] ANNA M. WARREN,
United States Commissioner for the District of Nevada.

[Endorsed]: No. 5401. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. J. H. Bachenberg, Defendant. Bail Bond on Writ of Error. Approved this 7th day of June, 1921. E. S. Farrington, Dist. Judge. Filed June 7th, 1921. E. O. Patterson, Clerk. Moore & McIntosh, Attorneys at Law, Reno, Nevada. [49]

In the United States District Court for the District of Nevada.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GEO. BACHENBERG,
Defendant.

Bond on Writ of Error.

WHEREAS the defendant in the above-entitled action has sued out a writ of error through the United States Circuit Court of Appeals for the Ninth Circuit to the said United States District Court for the District of Nevada, from a judgment made and entered against him in said above-entitled cause in said United States District Court for the District of Nevada on the 6th day of June, A. D. 1921, or thereabouts; and

WHEREAS, the said defendant by an order of Court heretofore duly made and entered is required to enter into a bond in the sum of Five Hundred Dollars (\$500.00) to guarantee the payment of all costs in said cause.

NOW, THEREFORE, in consideration of the premises and of the suing out of said writ of error to the said Court of Appeals for the Ninth District of the United States, we, the undersigned, residents of the County of Washoe, State of Nevada, do hereby jointly and severally undertake and promise on the part of the said Geo. Bachenberg that the said person will pay all damages and costs which may be awarded against him on account of the said writ of error or on the dismissal thereof, not exceeding the sum of [50] Five Hundred Dollars (\$500.00), in which amount we acknowledge ourselves jointly and severally bound.

WITNESS our signature this 28th day of June, A. D. 1921.

ALBERT A. BARONI.
S. M. PICKETT.

State of Nevada,
County of Washoe,—ss.

Albert A. Baroni and S. M. Pickett, each for himself and not one for the other, being first duly sworn, deposes and says: That he is a resident and householder of the County of Washoe, State of Nevada, and is the same identical person who signed the above and foregoing bond and undertaking; and that he is worth the sum of One Thousand Dollars (\$1000.00) over and above all indebtedness and in property subject to execution.

ALBERT A. BARONI.

S. M. PICKETT.

Subscribed and sworn to before me this 28th day of June, A. D. 1921.

[Seal]

M. B. MOORE,

Notary Public in and for Washoe County, State of Nevada.

My commission expires April 23, 1923.

[Endorsed]: No. 5401. In the United States District Court for the District of Nevada. United States of America, Plaintiff, vs. Geo. Bachenberg, Defendant. Bond. Approved June 28th, 1921. E. S. Farrington, Dist. Judge. Filed June 28th, 1921. E. O. Patterson, Clerk. Moore & McIntosh, Attorneys at Law, Reno, Nevada. [51]

In the District Court of the United States, in and
for the District of Nevada.

No. 5401.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. H. BACHENBERG,

Defendant.

Testimony.

This case came on for trial in the above-entitled court on Saturday, May 7th, 1921, at 10 o'clock A. M. of said day, before the Honorable E. S. Farrington, Judge of said Court, and a jury, a jury having been duly and regularly impaneled and sworn to try said case.

Mr. M. A. Diskin, Assistant United States Attorney, appearing as attorney for plaintiff, and Messrs. Moore & McIntosh appearing as attorneys for the defendant.

Whereupon, after the reading of the indictment by the Clerk, the following proceedings were had and testimony introduced: [52]

Mr. DISKIN.—We waive our opening statement, and call Mr. Brown.

Mr. MOORE.—If the Court please, at this time I object to the introduction of any testimony on the part of any witness as to what was done and what was found or seized in the premises occupied by this defendant in Reno, and as described in the affidavit and in the search-warrant, which are a part

of the records in this case, on the grounds that the evidence, and all the evidence on the part of the Government, was secured by reason of an illegal and unlawful search of the defendant's premises, and of his property; that there was no valid or sufficient affidavit filed with the magistrate, or commissioner who issued the search-warrant in question, or showing that probable cause existed that any crime had been, and was being committed, and that the evidence in the possession of the Government in this case was secured in violation of the constitutional rights of this defendant, as provided in the Fourth Amendment to the Constitution of the United States; and that its admission in testimony here will be in violation of the Fifth Amendment to the Constitution of the United States.

I base this upon the motion in the case, and the proceedings heretofore had. I understand the Court has ruled on that.

The COURT.—I have heretofore passed on that.

Mr. MOORE.—The Court denies my motion?

The COURT.—Certainly. I have already passed on that. In my opinion, the warrant complies with the statute, and with the Constitution. I do not think it invades any of the defendant's rights; and it seems to me there was sufficient positive [53] testimony given by the affiant himself as to what he had seen and heard, in addition to what had been told him and sworn to, by a reputable citizen, to justify the issuance of the warrant, and to establish probable cause.

Mr. MOORE.—We note an exception to the ruling of the Court.

Testimony of H. P. Brown, for the Government.

Mr. H. P. BROWN, called as a witness on behalf of the Government, after being sworn, testified as follows:

Direct Examination by Mr. DISKIN.

Q. Your initials, please, Mr. Brown? A. H. P.

Q. You are a prohibition enforcement agent?

A. Yes, sir.

Q. You were such officer on the 9th of April, 1921? A. Yes, sir.

Q. Do you know the defendant in this case, J. H. Bachenberg? A. Yes, sir.

Q. Do you know what business the defendant was engaged in on or about the 9th of April, 1921?

A. He ran a soft drink establishment known as the Palace Bar.

Q. Where is that situated?

A. On the corner of Commercial Row, and I don't know the other street; the street the Golden Hotel is on, I don't know the name of the street.

Q. Center Street? A. Center Street.

Q. Did you enter those premises on the 9th of April, 1921? A. Yes, sir.

Q. Who was with you? A. Mr. Nash. [54]

Q. What, if anything, took place after you went in?

Mr. MOORE.—If the Court please, I do not wish to renew my objection to all these questions, so may it be understood that my objection goes directly now to what took place on the part of this witness,

(Testimony of H. P. Brown.)

and what he did, and what he found there, so I need not interrupt?

The COURT.—It will be so understood, and you may have an exception.

A. We entered the premises about eight o'clock, and Mr. Bachenberg was down at the end of the bar when we entered, and when he saw us come in the door he made a run for this end of the bar.

Mr. DISKIN.—(Q.) That is, the front end of the bar?

A. The front end of the bar; and I jumped over the bar and caught him as he was coming by, and he made a kick at the bottle which was on the floor alongside of a hole, and he kicked the bottle over, but it didn't go down the hole; he and I had a little tussle there, and he went to the floor, and Mr. Nash came over, and Mr. Nash stated to me to let him up, that he had destroyed the evidence; when I let him up he made a run for the hole in the floor, and the bottle was about four feet then from the hole in the floor, and he stamped on the bottle, and tried to destroy the evidence; and I grabbed him again and pulled him away from there, and he hollered at one of the outsiders, outside of the bar, to jump over the bar and destroy that evidence, and the party that he hollered to made an effort to jump over the bar, and was stopped by one of the outside officers, the chief of police.

Q. You say there was a hole back of the bar?

A. Yes, sir. [55]

Q. How large a hole was it?

(Testimony of H. P. Brown.)

A. I should judge about ten inches square, in the floor leading down to the cellar.

Q. And how far was the bar from this hole, would you say?

A. From the bar, it was right underneath the bar, the back-bar, or the drain-board, rather.

Q. It was near the drain-board?

A. Yes, sir, underneath the drain-board.

Q. With reference to whether or not this hole was in the center of the bar, what would you say?

A. Well, it was more toward the end of the bar, a little over the average would be toward the end of the bar, toward the office.

Q. Did you make any investigation of the portion of the cellar under the hole? A. Yes, sir.

Q. And what, if anything, did you see?

A. There was a large pile of rocks right directly under the hole in the floor.

Q. Now you say when you went in there first Mr. Bachenberg was down at the end of the bar?

A. At the further end of the bar, serving some drinks down there.

Q. And you jumped over the bar immediately, did you?

A. Not till he made a run to come up toward this end of the bar; then I jumped over and met him.

Q. In that effort that you made, would you say it was a run or a fast walk? A. A run.

Q. And where did you after that locate the bottle?

(Testimony of H. P. Brown.)

A. On the floor, about four feet from the hole, lying on its side. [56]

Q. Do you know what became of the bottle?

A. Yes, sir; Mr. Nash picked the bottle up.

Q. How long do you think you tussled with the defendant?

A. Oh, I don't know; about fifteen or twenty seconds. I had two tussles with him.

Q. You let him up after the first tussle?

A. Mr. Nash said that he had destroyed the evidence, and I let him up, and he made a run then for the bottle, and tried to destroy it with his feet.

Q. What sort of an effort did he make with his feet?

A. Jumped on top of the bottle two or three times; then I pulled him away from it, and told Mr. Nash to get the bottle.

Q. What you have testified to occurred at Reno, Washoe County, Nevada, did it? A. Yes, sir.

Mr. DISKIN.—Cross-examine.

Cross-examination.

Mr. MOORE.—(Q.) You and Mr. Nash are both Federal prohibition enforcement officers?

A. Yes, sir.

Q. What time in the day or night was it when you went there?

A. Eight o'clock in the evening.

Q. Eight o'clock at night, after dark?

A. Yes, sir, just after dark.

Q. A good many people in the place, were there?

A. Quite a few.

(Testimony of H. P. Brown.)

Q. How many people were down at the lower end of the bar where Mr. Bachenberg was?

A. I could not swear.

Q. Did you notice what sort of drinks he was serving there? [57]

A. No, sir, I did not.

Q. When you went in did either you or Mr. Nash say anything to him, or any one else?

A. No, sir, didn't have time.

Q. You went in pretty fast yourself, didn't you?

A. No, sir, I walked right in the front door, but I got pretty fast when I saw the defendant make a run.

Q. And when you saw him coming up, as you say on the run, towards the other end of the bar, did you say anything to him then?

A. No, sir, I hopped over the bar.

Q. You jumped over the bar? A. Yes, sir.

Q. Did Mr. Nash say anything to you?

A. No, sir.

Q. Did either one of you tell him you were officers, or had a search-warrant?

Mr. DISKIN.—That is objected to as immaterial, and not proper cross-examination; it does not tend to prove any issue in the case.

Mr. MOORE.—If the Court please, under a recent ruling of the Supreme Court of the United States this examination is perfectly proper; the case of United States vs. Amos, in which the facts were brought out, and everything that was done, and the fact that there was no search-warrant in the pos-

(Testimony of H. P. Brown.)

session of the officers at the time they made the search, and the court characterizes it as proper cross-examination.

The COURT.—Do you contend there was no search-warrant in the possession of the officers at this time?

Mr. MOORE.—No, I have admitted here, and the record shows they had a paper.

The COURT.—How does the Amos case fit this one? [58]

Mr. MOORE.—Upon this point, if the Court please: As I have heretofore expressed myself to the Court, it is my contention before the officers may make a search of a man's business or home, they must declare they have a search-warrant, that they are officers, and present a copy of the warrant to the party in possession; and it is upon that point that I desire to introduce this testimony.

The COURT.—Well, I will let you ask that question; but when I do so I want to say I think it is immaterial. I will allow you to ask it because it is a part of the *res gestae*; but if it is ever established as the law that when an officer goes into a place to make a search or to make an arrest, that he can not arrest the man, no matter what he is doing, that he cannot make a search, that he cannot seize the evidence, until he approaches the defendant and announces that he has a warrant, I think the officers may just about as well stay at home. I have never seen any such authority, and if you can find one I should be very glad to see it. The authorities

(Testimony of H. P. Brown.)

that I have seen on the subject simply state that an officer is not bound to wait until the evidence is destroyed before he announces that he has a search warrant.

Mr. MOORE.—What was the question, please?
(The reporter reads the question.)

A. Not at that time, at that particular moment. He knows who we are.

Mr. MOORE.—I object to that as a conclusion of the witness.

The COURT.—That may go out.

Mr. MOORE.—(Q.) At the time you jumped over the bar and [59] seized him, did you tell him you were there to search his premises, and for him to stop?

A. I believe Mr. Nash said something, I didn't.

Q. What did you say?

A. I didn't say a word, not for a few seconds; I was too busy.

Q. Did you say anything to him until after you had the second tussle with him, as you say you had?

A. I don't believe I did.

Q. Which one of you had the search-warrant in your possession? A. I didn't have it.

Q. You were aware that Mr. Nash had a warrant with him? A. Yes, sir.

Q. And you preceded Mr. Nash, did you, in the operations? A. Yes, sir.

Q. After you had jumped over the bar and grappled with the defendant, then Mr. Nash also followed you and assisted you?

(Testimony of H. P. Brown.)

A. Yes, sir; I guess he came over the bar, I could not testify that he did.

Mr. MOORE.—I think that is all.

Redirect Examination.

Mr. DISKIN.—(Q.) Did you know the defendant Bachenberg prior to the time you entered the saloon on this day? A. Yes, sir.

Q. How long had you known him?

A. Oh, I had known him for a year and a half or two years.

Q. Do you know whether or not he knew you were an enforcement officer?

Mr. MOORE.—I object to that on the ground it calls for [60] a conclusion of the witness whether he knew. He may ask if he had ever told him so.

The COURT.—If you want to bring that out you had better draw out the facts.

Mr. MOORE.—I also object to it as irrelevant and immaterial.

Mr. DISKIN.—(Q.) Did you have any conversation with Mr. Bachenberg prior to this time, Mr. Brown? A. No, sir.

Mr. DISKIN.—That is all.

Mr. MOORE.—(Q.) Had you ever been in his place? A. No, sir.

Mr. MOORE.—That is all.

Testimony of P. Nash, for the Government.

Mr. P. NASH, called as a witness on behalf of the Government, after being sworn, testified as follows:

Direct Examination by Mr. DISKIN.

Q. You are a prohibition enforcement officer, Mr. Nash? A. Yes, sir.

Q. And you were on the 9th day of April, 1921?

A. Yes, sir.

Q. Do you know the defendant in this case, J. H. Bachenberg? A. I do.

Q. What business was he engaged in on the 9th of April, 1921?

A. He had a soft drink place on the corner of Commercial Row and Center Street, called the Palace Bar.

Q. In the City of Reno?

A. In the City of Reno.

Q. Do you know how many entrances there were to that bar? [61]

A. The only one I noticed was one on the corner; there may be a side door.

Q. Off of Center Street?

A. Right on the corner of Center and Commercial Row.

Q. Did you have occasion to enter those premises on the 9th of April, 1921? A. I did.

Q. Who was with you? A. Mr. Brown.

Q. Through what door did you go?

A. This main entrance right off the corner.

(Testimony of P. Nash.)

Q. Was anyone in there at that time?

A. Yes, sir; possibly—I think there must have been twenty or thirty people at least; the lower end of the bar, there were at least—

Mr. MOORE.—Just a moment. If the Court please, in order that I may have my record correct, I object to any testimony on the part of this witness as to what he did or what he saw, basing my objection on the same grounds I have hitherto stated in the objection to the testimony of the other witness, and the general objection to the introduction of any testimony.

The COURT.—It will be the same ruling, and the same exception.

WITNESS.—(Contg.) Four or five customers, I presume, standing in front of the bar. When I say the lower end of the bar I mean the end of the bar next to Commercial Row.

Mr. DISKIN.—(Q.) Where was the defendant?

A. He was at the upper end of the bar.

Q. What, if anything, did you do after you entered the place? [62]

A. Why, I tried—the first thing that we saw when we saw the defendant, he recognized us.

Mr. MOORE.—I object to that, that “he recognized us,” as a conclusion of the witness.

The COURT.—That may go out.

WITNESS.—As we came in the door, the first notice that we saw the defendant was his quick actions, leaving the place where he was serving a customer at the upper end, and starting down to—

(Testimony of P. Nash.)

ward the lower end of the bar, on a run. Due to the fact that there was these parties in front of the bar I spoke of, we had quite a little—it was quite hard for us to get over the bar; in fact, I made two endeavors on my own part to get over before I got over the bar.

Mr. DISKIN.—(Q.) Who went over the bar first, you or Mr. Brown?

A. Brown went over the bar first; I was hindered from going over; I made two tries, and then I lit on my head, I think.

Q. When Mr. Brown got over where was the defendant?

A. He was running down the inside.

Q. On the inside of the bar? A. Yes.

Q. What happened after Brown got over the bar?

A. Brown and the defendant met—oh, I don't know, two or three or four feet from where this hole was, where the bottle was; and when I got to my feet I looked where this bottle was, in the expectation of seeing the bottle, and didn't see it there; Mr. Brown had the defendant, grappling with him at that time, and they were mixed in behind the bar there; in fact, I believe they were down on the floor, both of them; I am not positive of that, either that or very near the floor; I told Brown to let him up, [63] that the evidence was gone; I gave one look at this hole and didn't see any bottle; and I said, "Let him up, the evidence is gone"; and Brown released him, and without saying a word he brushed past me, and started to

(Testimony of P. Nash.)

stamp on this bottle, and we both of us grappled him at that time, but I released him and tried to pick up the bottle.

Q. Where did you first see the bottle?

A. Laying on the floor, flat, not standing up, but laying on the floor flat, and possibly from four to six feet away from where the hole was.

Q. Now, in this second tussle did you hear the defendant make any remark of any kind?

A. Yes, sir, I heard him call out two or three times, "Jump over the bar and break the bottle," or words to that effect; or "Come over the bar and break the bottle"; the idea was, of course, that he was calling to somebody on the outside of the bar to destroy the evidence.

Mr. MOORE.—I move that be stricken out, after the word "idea."

The COURT.—That may go out.

Mr. DISKIN.—No objection.

The COURT.—Just the last part of it, the idea.

Mr. DISKIN.—(Q.) Did you examine that hole?

A. Yes, sir.

Q. How large a hole was it?

A. Oh, I should judge around ten inches square, something in that nature.

Q. And where was it in reference to the drain-board?

A. Oh, the drain-board, right directly—in close proximity to the drain-board; I would not like to say as to the number of [64] inches, or anything of that nature; the only time I ever saw it was that

(Testimony of P. Nash.)

night; I didn't measure it with a tape-line, or anything of that kind.

Q. Did you make any investigation of the cellar or basement? A. I did.

Q. What, if anything, did you find in this hole?

A. Directly under this hole was a locked compartment or room, possibly eight or ten feet square, with a padlocked door; the defendant opened this door with his key, and in this compartment was this pile of rocks directly under the hole.

Q. What became of the bottle, Mr. Nash, which you had testified to, or saw in the defendant's premises?

A. I took it in my possession; sealed it at the police station, put the seal on it and labeled it, and then delivered it personally to Professor Dinsmore that evening.

Q. Prior to the time you took the bottle and delivered it to Professor Dinsmore, was it always in your possession?

A. Either in my possession, or Mr. Brown's.

Q. Would you be able to identify the bottle?

A. I would.

Q. Will you examine that bottle, and its contents? (Hands to witness.)

A. That is the same bottle, with my writing on it, on the label, with my initials and Mr. Brown's initials. I know it by the label; know it also by the fact of this seal that was placed on it that evening; the wax seal we placed on it underneath Professor Dinsmore's seal.

(Testimony of P. Nash.)

Q. From the time you received that bottle until you delivered it to Professor Dinsmore, did you put anything in the bottle? A. I did not. [65]

Q. And the substance that was in the bottle at the time you seized it and at the time you delivered it to Professor Dinsmore was absolutely the same?

A. Absolutely. I did taste the liquor in the bottle, I think it was in the police station; but at no time had the bottle been out of our custody. I tasted it up there; it was liquor.

Q. You are familiar with the taste of liquor?

A. I am.

Q. From the examination you made of the contents of this bottle, can you say whether this was liquor, or not?

A. I can swear that is some sort of whisky.

Mr. DISKIN.—I offer the bottle in evidence.

Mr. MOORE.—Object on the same grounds we have heretofore imposed to all this line of testimony, if the Court please.

The COURT.—It will be the same ruling and the same exception.

Mr. DISKIN.—Cross-examine.

(The bottle is marked Plaintiff's Exhibit No. 1.)

(A short recess is taken at this time.)

Cross-examination.

Mr. MOORE.—(Q.) Mr. Nash, on the date mentioned in April when you went into the premises of Mr. Bachenberg, you were a Federal officer?

A. Yes, sir.

(Testimony of P. Nash.)

Q. And one of the Federal prohibition enforcement officers? A. Yes, sir.

Q. Who else was with you at that time?

A. Mr. Brown.

Q. Any one else?

A. Oh, we had a couple of local men went in behind us to shoo the crowd away if they got too thick. [66]

Q. It was about eight o'clock at night when you went there on that date, was it?

A. Seven-fifty-five, to be exact.

Q. Seven-fifty-five; it was after dark?

A. Yes.

Q. You had a search-warrant in your possession, did you? A. I did.

Q. And you secured that from Mrs. Anna M. Warren, United States Commissioner? A. I did.

Q. I show you, Mr. Nash, a document on which your name appears on the back. "Reno, Nevada, April 10, 1921," on the back, and the signature of Mrs. Anna M. Warren appears on the body of it, and the head of the paper is entitled "Search-warrant"; I ask you to state if that is the instrument you had with you.

A. This is the instrument, with my return on the back.

Q. That is the one you had with you? A. Yes.

Q. And the only one? A. I had a copy of it.

Q. But that is the original? A. Yes.

Q. When you went into the premises, and before you and Mr. Brown leaped over the bar, as you

(Testimony of P. Nash.)

have stated, did you inform Mr. Bachenberg that you had a search-warrant?

A. No, sir, no time to do anything of that sort.

Mr. MOORE.—I move that be stricken out. Just answer my question.

The COURT.—That may go out; but he will have the privilege of making an explanation why he didn't.

Mr. MOORE.—Very well.

Q. Before Mr. Brown seized Mr. Bachenberg, behind the bar, did you announce to him that you had a search-warrant to search his premises?

A. No, I don't believe that I announced to Mr. Bachenberg that [67] I had a warrant during the time of the struggle.

Q. And you did not announce to him that you had a warrant until after you had picked up the bottle, did you?

A. No, I did not; in fact, I didn't give him the warrant for quite a little while afterwards; he recognized—do you want me to go ahead and explain about this warrant business?

Q. We will wait for that. If the Court permits you to make an explanation of that later on, we will wait for that. Now, Mr. Nash, had you ever been in the premises before, since Mr. Bachenberg has been there?

A. I am not positive. I may have been, I don't remember.

Q. Had you ever been behind that bar before?

(Testimony of P. Nash.)

A. No.

Q. And the hole that you speak of there, you discovered during the time you were behind the bar, and at the time you seized the bottle that has been presented here?

A. Well, you might call it discovered; I knew it was there.

Q. You had never been there?

A. No. There is other ways of knowing besides seeing it, isn't there?

Q. Of your own actual knowledge. You knew it was there; you mean, don't you, somebody told you it was there?

A. Put it that way if you like.

Q. Is not that a fact, that somebody told you it was there?

A. It is a fact my knowledge was sufficiently correct that the hole was there, and I have testified to the hole being there.

Q. Will you answer my question, please, Mr. Nash? A. All right.

Q. Did you have any other knowledge of there being a hole in that floor, except what some other person had told you? [68]

A. No, I never saw the hole before I went over the bar.

Q. And you had prior to that time, had you—

The COURT.—I don't know about going into this thing. I have already pronounced that search-warrant valid; and if there is any mistake, it is my

(Testimony of P. Nash.)

mistake, and not a matter that the jury can pass on now.

Mr. MOORE.—I am quite well aware of that fact, if the Court please; and I will state clearly that the only purpose I have in going into this matter at this time, is for the purpose of my record, and as the basis, further, of making a motion in a few minutes, after I have completed Mr. Nash's cross-examination. I will state to your Honor, so it will save time—I don't think it will prejudice the jury at all—that the question I wish to ask him is as to whether or not this other instrument I hold is the affidavit that he made before Mrs. Warren, which is the basis of this search-warrant, and whether or not it is the only affidavit that he made.

The COURT.—You brought this matter up on motion, and the petition was filed, was it not? At any rate, the proceeding was brought before me, and you had ample opportunity then to introduce any evidence you wished. I passed on the matter, and held that the warrant was good. Now, if the testimony is introduced before the jury, what shall I instruct the jury? Shall I instruct them they are now to pass on the same question I have already passed on? Are they to determine whether this is a valid warrant or not, and whether there was probable cause? Under any theory of the case I don't think that can come before the jury at this time; and, furthermore, under the Weeks case [69] and the Adams case, it is hardly proper to stop in the course of a trial to determine whether

(Testimony of P. Nash.)

the search-warrant is regular or not, particularly after the matter has been gone into before the trial, and counsel have had opportunity to have it determined.

Mr. MOORE.—As I stated, the only purpose of this cross-examination was for the basis of a motion, which is to strike the testimony of both these witnesses from the record, and all of it, relative to the search and seizure made there.

The COURT.—I don't think I shall permit it now. You have had your opportunity already, and I do not think we can stop to go into those matters now.

Mr. MOORE.—We reserve an exception to the Court's ruling.

The COURT.—You may have the exception. If this were the only case where that question would come up, possibly I would permit it, but there are a great many cases of this kind; and if the question is to be tried once before the Judge and another time before the jury, it is going to take a great deal of time, and I do not like to set the precedent. Counsel will always have ample opportunity before the trial to raise all those questions, and they can be passed on by the Court. The question has been raised already; it is one purely for the Judge to pass on, and not for the jury, and the rule hereafter will be that all questions of that kind must be disposed of before the trial.

Mr. MOORE.—Well, I will state to the Court,

(Testimony of P. Nash.)

that the Court has disposed of them with the exception of this one.

The COURT.—You had ample opportunity to bring it up before.

Mr. MOORE.—I could not bring it up on motion to strike the testimony out. [70]

The COURT.—You have had ample opportunity to bring out all these facts, every one of them, on the question as to whether there was probable cause or not. I however, do not wish to be understood as saying that the motion and the papers that were presented were sufficient to bring up all those questions, but there was no reason why you should not have brought them all up.

Mr. MOORE.—I think that is all.

Redirect Examination.

Mr. DISKIN.—(Q.) Why didn't you present your search-warrant to Mr. Bachenberg prior to your going over the bar?

Mr. MOORE.—If the Court please, I object to the question as not proper cross-examination, and it is irrelevant at this time.

The COURT.—The objection will be overruled.

Mr. MOORE.—Give us the benefit of an exception.

WITNESS.—I had no opportunity to do so. To present a search-warrant it is necessary that the man will take it; I can't pass the search-warrant through the air to him, when he is running.

Mr. DISKIN.—(Q.) When you first saw Mr. Bachenberg on this occasion what was he doing?

(Testimony of P. Nash.)

A. At the very instant that we entered the door, before he turned his face in our direction, he was standing at the upper end of the bar serving a drink, but as soon as Mr. Brown and myself came inside, he left his position and started running down the length of the bar on the inside; and then the two struggles that were spoken of previously took place. As soon as the second struggle was over and Mr. Bachenberg rose to his feet, I told him I had a warrant; he says, "I know that," he says, "I know you, and you would not be here without a warrant," or words to that effect. [71] I said, "All right then." Then we went right ahead. I told him I would give him a copy of it, and I also told him I would give him a receipt for the liquor that we seized; I did before we parted company, but I didn't give him a receipt behind the bar for the liquor, because of the fact we were not through with our search; we went into the cellar and spent fifteen minutes down there. Before we parted company, though, I gave him a copy of the warrant, and also gave him a receipt for the liquor seized.

Q. In the conversation which you had with Mr. Bachenberg, did he state anything with reference to whether or not he knew you?

A. He said he knew me, yes, knew who I was. I judged from what he said he must have known me, because the first thing he said was "I know who you are; that is all right"; that is the way I think he put the answer to my statement that I was an

(Testimony of P. Nash.)

officer with a warrant; he says, "I know who you are, and that is all right.

Mr. DISKIN.—I think that is all.

Mr. MOORE.—Now, if the Court please, in order to have my record complete as I view it, I move that the testimony of Mr. Brown and Mr. Nash relative to what occurred in the premises this evening at the time they made the search be stricken from the record, for the reason it now appears that it was secured in an unlawful and illegal manner, basing my motion upon the files and records in this case, and upon the testimony now given by the officers.

The COURT.—The motion is overruled, and you may have an exception.

Mr. MOORE.—We note an exception. [72]

Testimony of S. C. Dinsmore, for the Government.

S. C. DINSMORE, called as a witness on behalf of the Government, after being sworn, testified as follows:

Direct Examination by Mr. DISKIN.

Q. What is your full name, Professor?

A. S. C. Dinsmore.

Mr. DISKIN.—Do you admit his qualifications?

Mr. MOORE.—Yes, as a chemist.

Mr. DISKIN.—(Q.) I hand you Government's Exhibit Number One, Professor; will you examine that bottle and its contents? (Hands to witness.) Did you ever see that before?

A. Yes, sir.

(Testimony of S. C. Dinsmore.)

Q. When? A. I saw it on April 9th.

Q. 1921? A. 1921.

Q. And from whose custody did you receive it?

A. I received it from—

Mr. MOORE.—Just a moment. If the Court please, I object to any testimony from this witness relative from whom he received that bottle, or as to what he did with it, or in any connection, basing it upon the motions and objections heretofore made.

The COURT.—It will be the same ruling and same objection. Proceed.

WITNESS.—I received it from Mr. Nash.

Mr. DISKIN.—(Q.) Did you thereafter make any investigation or analysis of the contents of that bottle?

A. I did.

Q. What did your examination disclose as to the contents of that bottle?

A. It showed that it was an alcoholic beverage containing 41.9 per cent alcohol.

Q. From your examination and analysis of the content of that bottle, would you say whether or not the content was fit for use [73] as a beverage?

A. I would say that it was.

Mr. DISKIN.—Cross-examine.

Mr. MOORE.—No questions.

Mr. DISKIN.—That is all, Professor. The Government rests.

Mr. MOORE.—We have no testimony to offer, if the Court please.

After argument to the jury by counsel for the Government, the Court instructs the jury as follows:

Instructions of Court to the Jury.

The COURT.—Gentlemen, there is little necessity for any instructions in this case. The statute makes it a crime to have in one's possession intoxicating liquor. Of course there are exceptions to that rule, but this is not one of the exceptions. It is permissible for one to have intoxicating liquor in his private home, provided it is occupied by him as a dwelling and the liquor is there for his own use, and for the use of his family and his guests, and was lawfully obtained; but there is no testimony that this is a private dwelling, or that it is a home. In any event, if whiskey is found in the possession of an individual, the burden is on him to prove that it was lawfully acquired, that he had acquired it before the law went into effect, and had it in his own home and for his own use, and for the use of his family and his *bona fide* guests. Then it would be lawful; but there is nothing of that kind shown here. The evidence all shows it was in a soft drink establishment, and not a dwelling-house. What its purpose was you can infer from the circumstances, but the presumption under the statute is, that if one has possession of intoxicating liquor under such circumstances, the possession is for the purpose of barter and sale, and in violation of [74] the law; and if it is not so, the burden is on the defendant to establish that fact.

The statute defines intoxicating liquor as liquor fit for a beverage, which contains one-half of one per cent, or more, of alcohol by volume. You have heard the testimony of Professor Dinsmore on that point; it has not been disputed.

The defendant has not appeared in this case as a witness. You cannot consider that fact against him.

The burden is on the Government to establish its case within the lines I have given you, by evidence introduced on this stand. The defendant has a right to rely on that rule, and on the presumption that he is innocent until his guilt is proven beyond a reasonable doubt.

A reasonable doubt is one based on reason; it is a substantial doubt; it is not a possibility that his guilt has not been proven, but it is such a doubt as would govern one in the more weighty affairs of life.

Much has been said about the search-warrant. The search-warrant, and its legality, is a matter for the Court to determine, and I have already determined it. If I have made a mistake, it is my mistake, and one for which the jury is not responsible; it is a question which the jury cannot decide, it is a question solely for the Court.

You are to take the law as I give it to you, and you are to find the facts from the evidence as it is given from the witness-stand. You are not bound to accept any of the statements of fact which I recite, except as they are approved by your judgment.

**Certificate of Reporter U. S. District Court to
Transcript of Record and Proceedings.**

I, A. F. Torreyson, Reporter in the United States District Court for the District of Nevada, DO HEREBY CERTIFY:

That as such reporter I took *verbatim* shorthand notes of the testimony and proceedings in said court on the trial of the case of United States of America, Plaintiff, vs. J. H. Bachenberg, Defendant, on May 7th, 1921, and that the foregoing pages from 1 to 25, both inclusive, contain a full, true and correct transcription of my shorthand notes of the testimony given and proceedings had on said trial.

Dated May 23d, 1921.

A. F. TORREYSON.

[Endorsed]: In the District Court of the United States, in and for the District of Nevada. Honorable E. S. Farrington, Judge. United States of America, Plaintiff, vs. J. H. Bachenberg, Defendant. No. 5401. Transcript of Testimony. Appearances: Mr. M. A. Diskin, Assistant United States Attorney, for Plaintiff. Messrs. Moore & McIntosh, for Defendant.

WITNESSES:

	Direct	Cross	Redirect
Brown, H. P.....	3	6	9
Nash, P.	10	15	20
Dinsmore, S. C.			22
Filed May 24, 1921. E. O. Patterson, Clerk. [76]			

In the District Court of the United States for the
District of Nevada.

**Certificate of Clerk U. S. District Court to Tran-
script of Record.**

United States of America,
District of Nevada,—ss.

I, E. O. Patterson, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that I am custodian of the records, papers and files of the said United States District Court for the District of Nevada, including the records, papers and files in the case of United States of America, Plaintiff, vs. G. H. Bachenberg, Defendant, said case being No. 5401 on the docket of said court.

I further certify that the attached transcript, consisting of 78 typewritten pages numbered from 1 to 78, inclusive, contains a full, true and correct transcript of the proceedings in said case and of all papers filed therein, together with the endorsements of filing thereon, as set forth in the praecipe filed in said case and made a part of the transcript attached hereto, as the same appears from the originals of record and on file in my office as such clerk in the City of Carson, State and District aforesaid.

I further certify that the cost for preparing and certifying to said record, amounting to \$18.25, has been paid to me by Mr. M. B. Moore, attorney for the defendant in the above-entitled cause. [77]

And I further certify that the original writ of

error, and the original citation, issued in this cause are hereto attached.

WITNESS my hand and the seal of said United States District Court this 22d day of July, A. D. 1921.

[Seal] E. O. PATTERSON,
Clerk U. S. District Court, District of Nevada.

[78]

Letter from U. S. District Attorney Wm. Woodburn to Hon. E. S. Farrington.

Time and Place of Holding Court: At Carson City
—First Mondays in February, May and October.

DEPARTMENT OF JUSTICE.
OFFICE OF THE UNITED STATES
ATTORNEY.

DISTRICT OF NEVADA.

Sept. 23, 1921.

Honorable E. S. Farrington,
U. S. District Judge,
Carson City, Nevada.

My dear Judge Farrington:

Referring to your letter of the 13th inst., you are advised that it is agreeable to me that you certify the Bill of Exceptions in the cases of the United States vs. Vachina and United States vs. Bachenberg.

As to the trial of Davis during the latter part of this month it is impossible, so far as my engagements are concerned, to arrange.

I expect to be in Carson in a day or two and will consult with you in reference to this matter.

Very sincerely yours,

WM. WOODBURN,

W: W.

[Endorsed]: Filed Sept. 27, 1921. E. O. Paterson, Clerk, U. S. Dist. Court, Dist., Nevada. By _____, Deputy Clerk. [79]

In the District Court of the United States, in and
for the District of Nevada.

INDICTMENT FOR VIOLATION OF NA-
TIONAL PROHIBITION ACT.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

G. H. BACHENBERG,

Defendant.

United States of America,
District of Nevada,—ss.

Certificate of Judge to Bill of Exceptions.

The foregoing was prepared and submitted to me as a bill of exceptions by the defendant Sept. 13th, 1921, and I do now, in pursuance of the foregoing consent of Wm. Woodburn, U. S. Distict Attorney for the District of Nevada, certify that it is full, true and correct, and has been settled and allowed and is made a part of the record in this cause.

Done in open court this 27th day of September, 1921.

E. S. FARRINGTON,

Judge. [80]

In the District Court of the United States for the
District of Nevada.

**Certificate of Clerk U. S. District Court to Trans-
script of Record.**

United States of America,
District of Nevada,—ss.

I, E. O. Patterson, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that I am custodian of the records, papers and files of the said United States District Court for the District of Nevada, including the records, papers and files in the case of United States of America, Plaintiff, vs. G. H. Bachenberg, Defendant, said case being No. 5401 on the docket of said court.

I further certify that the attached transcript, consisting of 82 typewritten pages numbered from 1 to 82, inclusive, contains a full, true and correct transcript of the proceedings in said case and of all papers filed therein, together with the endorsements of filing thereon, as set forth in the praecipe filed in said case and made a part of the transcript attached hereto, as the same appears from the originals of record and on file in my office as such clerk in the City of Carson, State and District aforesaid.

I further certify that the cost for preparing and certifying to said record, amounting to \$19.50, has been paid to me by Mr. M. B. Moore, attorney for the defendant in the above-entitled cause. [81]

And I further certify that the original writ of error, and the original citation, issued in this cause are hereto attached.

Witness my hand and the seal of said United States District Court this 27th day of September, A. D. 1921.

[Seal]

E. O. PATTERSON,
Clerk U. S. District Court, District of Nevada.

[82]

In the United States District Court for the District
of Nevada.

No. 5401.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

G. H. BACHENBERG,
Defendant.

Writ of Error (Original).

United States of America,—ss.

The President of the United States, to the Honorable the Judge of the District Court of the United States of America, in and for the District of Nevada, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in

the said District Court before you, or some of you, wherein the United States is plaintiff and G. H. Bachenberg is defendant, a manifest error hath happened, to the great damage of the said G. H. Bachenberg as by the indictment in said cause and the record of proceedings therein appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, together with this writ, so that you have the same in the [83] said United States Circuit Court of Appeals at San Francisco, California, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable E. S. FARRINGTON, Judge of the said United States District Court of the District of Nevada, the 6th day of June, in the year of our Lord one thousand nine hundred and twenty-one.

[Seal] E. O. PATTERSON,
Clerk of the United States District Court for the
District of Nevada.

Allowed by:

E. S. FARRINGTON. [84]

[Endorsed]: No. 5401. In the United States District Court for the District of Nevada. United States of America, Plaintiff, vs. J. H. Bachenberg, Defendant. Writ of Error. Filed June 6, 1921. E. O. Patterson, Clerk. [85]

In the District Court of the United States, in and for the District of Nevada.

No. 5401.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

G. H. BACHENBERG,

Defendant.

Citation on Writ of Error (Original).

The United States of America,—ss.

The President of the United States to the United States of America, GREETING:

TO THE UNITED STATES OF AMERICA:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, State of California, within 30 days from the date of this writ, pursuant to a writ of error duly allowed by the District Court of the United States in and for the District of Nevada and filed in the clerk's office of said court on the 6th day of June, A. D. 1921, in a cause wherein G. H. Bachenberg is appellant and you are appellee, to show

cause, if any, why the judgment and decree rendered against the said appellant as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the party in that behalf.

WITNESS the Honorable E. S. FARRINGTON, Judge of the District Court of the United States, in and for the District of Nevada, this 6th day of June, A. D. 1921, and of the Independence of the United States, the one hundred and forty-fifth.

E. S. FARRINGTON,

District Judge. [86]

[Seal]

Attest: E. O. PATTERSON,

Clerk.

By _____,

Deputy.

Service of the within citation and receipt of a copy is hereby admitted this 6th day of June, A. D. 1921.

_____,

U. S. Attorney, District of Nevada.

[87]

[Endorsed]: No. 5401. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. J. H. Bachenberg, Defendant. Citation. Filed June 6, 1921. E. O. Patterson, Clerk. [88]

[Endorsed]: No. 3723. United States Circuit Court of Appeals for the Ninth Circuit. G. H. Bachenberg, Plaintiff in Error, vs. The United

States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Nevada.

Filed July 23, 1921.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 3723

United States
Circuit Court of Appeals
For the Ninth Circuit

G. H. BACHENBERG,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Brief for Plaintiff in Error

M. B. MOORE

Attorney for Plaintiff in Error.

Filed this.....day of....., 1922.

FRANK D. MONCKTON, Clerk.

By.....
Deputy Clerk.

FEB 23 1922

F. D. MONCKTON,
CLERK.

No. 3723

United States
Circuit Court of Appeals
For the Ninth Circuit

G. H. BACHENBERG,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Brief for Plaintiff in Error

STATEMENT OF THE CASE

I.

The above named plaintiff in error, G. H. BACHENBERG, on the 9th day of April, 1921, and prior thereto, was conducting a soft drink establishment on the premises on the Corner of Center Street and

Commercial Row, in the City of Reno, Washoe County, Nevada.

On the 9th day of April, 1921, P. Nash, a Federal Prohibition Enforcement Officer for the State and District of Nevada, went before Anna M. Warren, one of the United States Commissioners, for the District of Nevada, for the purpose of securing a search warrant to search the premises and property of the said G. H. Bachenberg, at the Corner of Commercial Row and Center Street, in the said City of Reno, for the purpose of discovering whether or not Bachenberg was violating the Prohibition Law; and the said P. Nash, on said date, made and filed an affidavit, Transcript of Record upon Writ of Error page 11:

"UNITED STATES OF AMERICA, DISTRICT OF NEVADA, COUNTY OF WASHOE.	}	ss.
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"On this 9th day of April, 1921, before me, Anna Warren, a United States Commissioner in and for the District of Nevada at Reno, Nevada, personally appeared P. Nash, who being first duly sworn, deposes and says:

"That he is and at all times herein mentioned was a Federal Prohibition Enforcement Agent in and for the District of Nevada and as such makes this affidavit and set forth the facts, circumstances and conditions hereinafter set forth that heretofore came to the knowledge of and were ascertained by affiant for the purpose of having issued hereon and hereunder a search-warrant,

under and pursuant to the provisions of Title II of the Act of Congress approved October 28, 1919, known as the National Prohibition Act, respecting the issuance of search-warrants, to search the following described premises, to-wit: Premises on the corner of Center Street and Commercial Row in the City of Reno, County of Washoe, State of Nevada, known as the Palace Bar, occupied by John Doe Brockenburg.

"That affiant has knowledge and information that in and upon the above-described premises, and since Title II of the said National Prohibition Act went into effect, to-wit: after the first day of February, 1920, that intoxicating liquor containing one-half of one per cent or more of alcohol by volume was and is now being manufactured, sold, kept and stored, possessed and bartered, for and fit for beverage purposes, in violation of the said National Prohibition Act and particularly of Section 21 of Title II of said act.

"That the facts, circumstances and conditions of which affiant has knowledge, and as ascertained by affiant are as follows, to-wit: Direct information to affiant by a certain citizen of Reno, whom affiant has known for a long time and whom affiant believes to be absolutely truthful and reliable that liquor is being sold over the bar at said premises and that said informant purchased a drink there on this date; that affiant and agent H. P. Brown have watched said premises and on one occasion saw two parties coming away from said premises under the influence of liquor.

"That it will be necessary to search the above described premises in order to secure for the United States the said intoxicating liquor and apparatus and material for the manufacture of

the same, and that it will be impossible to make the said search without the aid and use of a search-warrant, whereupon affiant prays that a search-warrant issue to enter the said premises and there to search for the said intoxicating liquor and apparatus and materials for the manufacture of the same, pursuant to the statute in such case made and provided.”

P. NASH.

“Subscribed and sworn to before me this 9th day of April, 1921.

(SEAL)

ANNA M. WARREN,
United States Commissioner.”

And on the same date the Commissioner, Anna M. Warren, after the making and filing of said affidavit, issued a search-warrant, which appears in the Transcript of Record Upon Writ of Error, pages 13 and 14:

“The President of the United States of America,
To the United States Supervising Prohibition Enforcement Agent and to His Deputies, or Any or Either of Them: Greetings:

“WHEREAS, P. Nash, has heretofore, towit, on the 9th day of April, 1921, filed with me, Anna M. Warren, a United States Commissioner in and for the District of Nevada, at Reno, Nevada, in which he states that he is a Federal Prohibition Enforcement Agent in and for the District of Nevada, working under the United States Supervising Prohibition Enforcement Agent at San Francisco, California; that in and upon those certain premises situate as fol-

lows, to-wit: Premises on the corner of Center Street and Commercial Row in the City of Reno, County of Washoe, State of Nevada, known as the Palace Bar, occupied by John Doe Brockenburg, that affiant has knowledge and information that in and upon the above described premises there is located and concealed, stored and kept, sold, possessed and bartered and fit for beverage purposes intoxicating liquor containing one-half of one per centum or more alcohol by volume, in violation of the National Prohibition Act and particularly of section 21 of Title II of the said Act.

"That it will be necessary to search the above described premises in order to obtain for the United States Government the said intoxicating liquor, and that it will be impossible to make the above mentioned search without the aid and use of a search-warrant, whereupon affiant prays that a search-warrant issue, covering the above-described premises and each and every building on said premises.

"NOW, THEREFORE, pursuant to Section 25, Title II of the said National Prohibition Act you are hereby authorized and empowered to enter the above-described premises in the daytime or in the night-time and each and every building on said premises and there to search for the above-mentioned intoxicating liquor which is concealed in violation of the National Prohibition Act, and to seize the said liquor and take the same into your possession to the end that the said liquor may be dealt with according to law, and to make due return hereof, with a written inventory of the property seized by you or either of you without delay.

"WITNESS my hand this 9th day of April, 1921.

ANNA M. WARREN,
United States Commissioner."

(ENDORSED)

Reno, Nev., April 10th, '21.

"Make return on within warrant as follows:

"Searched premises described within on April 9th, 7:55 P. M.

"Seized bottle containing liquor from behind bar.

"Arrested proprietor, Geo. H. Bachenberg, who was behind bar at time search was made.

"I, P. Nash, the officer serving the within warrant, hereby certify on oath, that the above inventory represents all the property taken under the warrant."

"P. NASH, Fed. Pro. Agt."

The said officer, P. Nash, in company with H. P. Brown, another Prohibition Enforcement Officer, during the evening of the 9th of April, 1921, proceeded to the premises and raided the same in a forcible manner. While they had the search-warrant in their possession, they did not disclose their purpose, but rushed into the place, leaped over the bar, overpowered Bachenberg, who was behind the bar waiting on customers, and made their search; and sometime thereafter told him they had a search-warrant and gave him a copy of it. The manner in which the raid was made is set out in the affidavit of G. H. Bachenberg, filed in support of a motion to quash the search-warrant in the District Court. See Transcript of Record Upon Writ of Error, page 10:

“STATE OF NEVADA
“COUNTY OF WASHOE,—ss.

“George Bachenburg, being first duly sworn upon his oath deposes and says: That he is the owner and proprietor of a certain business room and house situate at the corner of Center Street and Commercial Row, in the City of Reno, Washoe County, Nevada, and was in possession thereof on the 9th day of April, A. D., 1921, and that on the evening of said date while defendant was on duty behind the counter in said place of business, one P. Nash and H. P. Brown, Federal Prohibition Enforcement officers in a forcible and violent manner entered affiant’s place of business, leaping over the counter, seizing affiant and engaging in a struggle with affiant and overpowering him and overcoming him, and that said persons forcibly and unlawfully and without announcing that they were officers or that they were in possession of a search-warrant to search defendant’s premises, and without serving any copy of any search-warrant, or other warrant upon defendant, and in an illegal manner searched said premises and seized and took in their possession, one bottle containing liquor, and not until said officers had so forcibly attacked defendant and so forcibly and unlawfully searched said premises and seized said property did the said officers or either of them present to affiant or any other person any search-warrant or other warrant.

“Further affiant saith not.”

“GEO. H. BACHENBERG”.

Bachenberg was arrested, taken before the Commissioner and a Complaint filed charging him with a violation of the National Prohibition Act. Motion

to Quash the search-warrant was made before the Commissioner, the basis of the motion being that no sufficient or legal affidavit was made or filed by any person before the Commissioner prior to the issuance of the search-warrant, and that no sworn testimony was taken, and that no sufficient facts were presented to the Commissioner under oath, or otherwise, from which the Commissioner could determine that probable cause existed for the issuance of the search-warrant. Transcript of Record upon Writ of Error, page 5.

A Notice of said Motion to Quash, together with a copy thereof, was served upon the United States District Attorney William Woodburn, prior to the hearing of the said Motion. Transcript of Record Upon Writ of Error, page 3.

Thereafter, upon the hearing of said Motion to Quash, the Commissioner denied the same. Bachenberg was bound over to the District Court to await trial, and an indictment charging him with the violation of the Prohibition Act was returned into Court on the 26th day of April, 1921.

Thereafter, and before trial upon the said indictment, the Motion made before the Commissioner to quash the search-warrant, was renewed before the District Court and denied, and an original Motion made for the return of the liquor seized and to quash the search-warrant. Transcript of Record

Upon Writ of Error, bottom of page 7, continued on pages 8 and 9:

“Comes now the defendant above named and moves the Court to return to defendant one bottle containing liquor; said bottle being seized by one P. Nash and H. P. Brown and others unknown to defendant on the 8th day of April, A. D. 1921, and taken from the premises at the corner of Center Street and Commercial Row in the City of Reno, Washoe County, Nevada, which said premises were then and at said time used and occupied by defendant; and also moves the Court to quash that certain search-warrant issued by Anna M. Warren, one of the Commissioners of this court, on or about the 9th day of April, A. D. 1921, upon an affidavit made and filed before said Commissioner by one P. Nash on the 9th day of April, A. D. 1921, for the reason and on the ground that the said search and seizure was made by said persons forcibly and in an unlawful manner, and without the service or notice to defendant that said officers were in possession of a search-warrant; and for the further reason that said search-warrant was illegal and void for the reason that no sufficient or legal affidavit was made or filed by the said P. Nash or any other person before or with the said Commissioner, prior to the issuance of said search-warrant; that no witnesses were examined under oath before said Commissioner and no depositions taken in writing before said Commissioner before the issuance of said search-warrant and that no sufficient facts were presented to the said Commissioner under oath or by affidavit from which the said Commissioner could determine that probable cause existed that an offense was being committed by said defendant or had been committed by said defendant, or that said premises were being used or had been used for unlawful purpose,

or in violation of the National Prohibition Act, and that all of the acts of the said Commissioner and of the said Nash and Brown in the issuance of or in the service of or search of said premises and seizure of said described property was in violation of defendant's constitutional rights as provided under the Fourth Amendment to the Constitution of the United States, and that the retention of said liquors and the intended use thereof at the trial of defendant in the case now pending against him in this court will be in violation of defendant's constitutional rights as provided under the Fifth Amendment to the Constitution of the United States.

"Dated this 29th day of April, A. D. 1921."

"MOORE & McINTOSH,"
"Attorneys for Defendant."

The motion made in the District Court to return the property and to quash the search-warrant was supported by the affidavit of G. H. Bachenberg, *supra*. Transcript of Record Upon Writ of Error, page 10 *supra*.

The motion for the return of property and to quash the search-warrant was argued before the court and submitted, and afterwards by the court denied, to which exception was taken. See Transcript of Record Upon Writ of Error, page 18.

The case was called for trial on the 7th day of May, 1921, and after the jury had been impaneled and sworn to try the case, and before the introduction of any testimony, objection was made on behalf

of the defendant to the introduction of any testimony on the part of the Government secured or discovered by means of the search-warrant. See Transcript of Record Upon Writ of Error, page 52:

“Mr. MOORE: If the Court please, at this time I object to the introduction of any testimony on the part of any witness as to what was done and what was found or seized in the premises occupied by this defendant in Reno, and as described in the affidavit and in the search-warrant, which are a part of the records in this case, on the grounds that the evidence, and all the evidence on the part of the Government, was secured by reason of an illegal and unlawful search of the defendant’s premises, and of his property; that there was no valid or sufficient affidavit filed with the magistrate, or commissioner who issued the search-warrant in question, or showing that probable cause existed that any crime had been, and was being committed, and that the evidence in the possession of the Government in this case was secured in violation of the constitutional rights of this defendant, as provided in the Fourth Amendment to the Constitution of the United States; and that its admission in testimony here will be in violation of the Fifth Amendment to the Constitution of the United States.

“I base this upon the motion in the case, and the proceedings heretofore had. I understand the Court has ruled on that.”

During the examination of the witness, H. P. Brown, called by the Government, objection again was interposed to the same line of testimony. Transcript of Record Upon Writ of Error, page 54:

“Q. What, if anything, took place after you went in?

“Mr. MOORE: If the Court please, I do not wish to renew my objection to all these questions, so may it be understood that my objection goes directly now to what took place on the part of this witness, and what he did, and what he found there, so I need not interrupt?

“The COURT: It will be so understood, and you may have an exception.”

The objection was made to the testimony of P. Nash, a witness called by the Government, to the same line of testimony. See Transcript of Record Upon Writ of Error, page 63:

“Q. Was anyone in there at that time?

“A. Yes, sir; possibly—I think there must have been twenty or thirty people at least; the lower end of the bar, there were at least—

“Mr. MOORE: Just a moment. If the Court please, in order that I may have my record correct, I object to any testimony on the part of this witness as to what he did or what he saw, basing my objection on the same grounds I have hitherto stated in the objection to the testimony of the other witness, and the general objection to the introduction of any testimony.

“The COURT: It will be the same ruling, and the same exception.”

At the close of the testimony of Nash, motion was made to strike the testimony of Nash and Brown

from the record. See Transcript of Record Upon Writ of Error, page 75:

“Mr. MOORE: Now, if the Court please, in order to have my record complete as I view it, I move that the testimony of Mr. Brown and Mr. Nash relative to what occurred in the premises this evening at the time they made the search be stricken from the record, for the reason it now appears that it was secured in an unlawful and illegal manner, basing my motion upon the files and records in this case, and upon the testimony now given by the officers.

“The COURT: The motion is overruled, and you may have an exception.”

No testimony was introduced on behalf of the defendants. The Court instructed the jury and a verdict of guilty was returned. Before sentence was passed motion for new trial was made. Transcript of Record Upon Writ of Error page 28:

“Comes now the defendant above named and moves the Court that a new trial be granted for the following reasons, and on the following grounds, to-wit:

“1st. That the Court erred in its decision upon questions of law arising during the course of the trial.

“2d. That the verdict of the jury is contrary to law.

“MOORE & McINTOSH”
“Attorneys for Defendant”

The Motion for New Trial was denied; exception taken. The defendant was sentenced to pay a fine of Five Hundred (\$500.00) Dollars and costs, and to stand committed until paid.

Thereupon, a petition for Writ of Error was filed. Transcript of Record Upon Writ of Error, page 44:

“Now comes G. H. Bachenberg, the defendant in the above-entitled cause, and feeling himself aggrieved by the verdict of the jury and the judgment of the District Court of the United States for the District of Nevada, made and entered on the 6th day of June, A. D. 1921, hereby petitions for an order allowing him, said defendant, to prosecute a writ of error to the United States Circuit Court of Appeals of the Ninth Circuit from the District Court of the United States for the District of Nevada, and also prays the Court that a transcript of the record, testimony, exhibits, stipulation, proceedings and papers, duly authenticated, may be prepared and sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that said writ of error may be made a supersedeas and that your petitioner be released on bail in an amount to be fixed by the Judge of said District Court pending the final disposition of said writ of error.

“Assignment of Errors is filed with this petition.”

“MOORE & McINTOSH”
“His Attorneys”

Assignment of Errors were made and filed. See Transcript of Record Upon Writ of Error, page 29.

Citation on Writ of Error was issued and served. See Transcript of Record Upon Writ of Error, page 86.

Thereafter, Writ of Error was allowed. Transcript of Record Upon Writ of Error, page 45.

Bail Bond on Writ of Error filed. Transcript of Record Upon Writ of Error, page 46.

Bond on Writ of Error made and filed. Transcript of Record Upon Writ of Error, page 50.

The Assignment of Errors filed are nine in number.

Assignment No. I:

Based upon the denial of Motion for a new trial.

Assignment No. II:

Based upon the objection to the introduction of any testimony.

Assignment No. III:

Based upon the objection to the admission of the testimony of H. P. Brown.

Assignment No. IV:

Based upon the objection to the admission of the testimony of P. Nash.

Assignment No. VI:

Based upon the motion to strike the testimony of Brown and Nash from the record.

Assignment No. VII:

Based upon the objection to the introduction of testimony of S. C. Dinsmore.

Assignment No. VIII:

Based upon the denial made to renew the motion

to quash the search-warrant before the Commissioner.

Assignment No. IX:

Based upon the motion for the return of the property seized and to quash the search-warrant made in the District Court in this case, directly raise the question as to the sufficiency of the affidavit for the search-warrant; and

Assignment No. IX: also raises the question as to the legality of the search under the search-warrant.

Assignment No. V:

Based upon the refusal of the Court to permit counsel for the defendant to inquire of P. Nash, a witness for the Government, as to his actual knowledge of the alleged facts and statements made in the affidavit for the search-warrant, raises the question as to whether or not, during the trial, the defendant counsel may inquire as to the actual knowledge and facts in the possession of the party who makes the affidavit for the search-warrant at the time it is made.

II.

The questions raised by the Assignments of Error Nos. 1, 2, 3, 4, 6, 7 and 9, are all based upon and grow out of the proposition involved in the motion referred to under Assignment No. 9: "That the Court erred in overruling defendant's motion made in the case to quash the search-warrant issued by

Anna M. Warren, United States Commissioner in and for the District of Nevada, on the 9th day of April, 1921, and for the return to the defendant of the property taken under said search-warrant."

The search-warrant referred to in the foregoing Assignment of Error was issued as the result of an affidavit filed before the Commissioner Anna M. Warren, at the time the search-warrant was issued. The facts as alleged are as follows: Transcript of Record Upon Writ of Error, page 11 and 12, excerpt from the affidavit of P. Nash:

"That the facts, circumstances and conditions of which affiant has knowledge and as ascertained by affiant are as follows, to-wit: Direct information to affiant by a certain citizen of Reno, whom affiant has known for a long time and whom affiant believes to be absolutely truthful and reliable that liquor is being sold over the bar at said premises and that said informant purchased a drink there on this date; that affiant and agent H. P. Brown have watched said premises and on one occasion saw two parties coming away from said premises under the influence of liquor."

The foregoing excerpt in quotations is the only statement of facts to be found in the affidavit upon which the search-warrant was issued, and the only statement of alleged facts to be found any place in the record, or elsewhere, that was made before the Commissioner who issued the affidavit. The only statement contained in the affidavit of any fact

within the actual knowledge of the party making it is, "that affiant and agent H. P. Brown have watched said premises and on one occasion saw two parties coming away from said premises under the influence of liquor."

The other portion of the affidavit is the rankest hearsay. In the last quoted paragraph of the affidavit there is no fact alleged except that at sometime (how remote we do not know) and on one occasion, Nash and Brown saw two parties coming from the premises under the influence of liquor. No allegation or statement as to their condition when they entered, or that they saw them enter, or as to the identity of the persons under the influence of liquor.

Let us test the sufficiency of this affidavit by the provisions of Sec. 19 of the Act of June 5th, 1917, commonly called "Espionage Act". Sec. 19 provides that any person making a false affidavit for the purpose of securing the search-warrant shall be punished, as provided in Section 125-126 of the Criminal Code of the United States. Section 125-126 of the Criminal Code provide for the prosecution and punishment of anyone committing perjury. The sufficiency of the affidavit being tested under this Section, it becomes at once apparent that no successful prosecution would follow for the making of an affidavit of this character, however ill-founded or for whatever malicious purpose it might have been made.

There is no date given so as to fix the time when

Nash claims to have seen the two persons come from the premises in an intoxicated condition; there is no description of the two persons given to identify them as either male or female, or their nationality; there is no name given by which they could be identified. It necessarily follows that no successful prosecution for perjury could be maintained. The sufficiency of the affidavit must be established by its contents, and not by what is found upon a search.

Supposing that a search-warrant be issued upon such a affidavit and a person's premises or property searched, and the officers failed to find any liquor or other evidences that the National Prohibition Law has been violated? What redress would the person who had suffered the disgrace of such a search have? The National Prohibition Enforcement Officers are not under bond, consequently, an action for malicious trespassing would avail nothing. They have alleged no fact in the affidavit, consequently, an action or prosecution for perjury would fail. If such an affidavit be held sufficient, then all our citizens and their property may be searched with impunity, and the safety and protection of the people at large as guaranteed and provided in the Fourth Amendment to the Constitution of the United States, be destroyed; which Amendment provides "The right of the people to be secure in their persons, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause supported by oath or affirmation, and

particularly describing the place to be searched and the persons or things to be seized.”

If such an affidavit be held sufficient the Act of June 5th, 1917, commonly called the “Espionage Act”, providing for the manner and circumstances under which a search-warrant may be issued, and what the affidavit shall contain, becomes a dead letter. Section III of said Act, in substance says:

“That no search-warrant shall be issued but upon probable cause supported by an affidavit naming or describing the person, and particularly describing the property and place to be searched.”

Section IV of said Act is in substance:

“That the magistrate must, before issuing the search-warrant, examine on oath the complainant and any witnesses he may produce.”

Section V of said Act is in substance:

“The depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist.”

Section XIX of the said Act provides in substance:

“That any person making a false affidavit for the purpose of securing the search-warrant shall be punished, as provided in Section 125-126 of the Criminal Code of the United States.”

Upon this point we quote from the opinion in the case of *Veeder v. U. S.* 252d Fed. page 414, decided by the Circuit Court of Appeals for the Seventh Circuit, on page 418:

“A brief statement of the applicable principles of law will suffice, for they are so well settled, so obvious from a reading of the constitutional and statutory provisions in question, so founded in the instructive sense of natural justice, that no elaboration of the grounds therefore is needed.

“One’s person and property must be entitled, in an orderly democracy, to protection against both mob hysteria and the oppression of agents whom the people have chosen to represent them in the administration of laws which are required by the Constitution to operate upon all persons alike.

“One’s home and place of business are not to be invaded forcibly and searched by the curious and suspicious; not even by a disinterested officer of the law, unless he is armed with a search-warrant.

“No search warrant shall be issued unless the judge has first been furnished with facts under oath—not suspicions, beliefs, or surmises—but facts which, when the law is properly applied to them, tend to establish the necessary legal conclusion, or facts which, when the law is properly applied to them, tend to establish probable cause for believing that the legal conclusion is right. The inviolability of the accused’s home is to be determined by the facts, not by rumor, suspicion, or guesswork. If the facts afford the legal basis for the search warrant, the accused must take the consequences. But equally there must be consequences for the accuser to face. If the sworn accusation is based on fiction, the accuser must take the chance of punishment for perjury. Hence the necessity of a sworn statement of facts, because one cannot be convicted of perjury for having a belief, though the belief be utterly unfounded in fact and law.

“The finding of the legal conclusion or of probable cause from the exhibited facts is a judicial function, and it cannot be delegated by the judge to the accuser.”

The principles stated in the foregoing opinion have been repeatedly announced by the Courts of the United States and of the Supreme Courts of the several states, both before and since, the opinion in the case of *Veeder v. U. S.* supra was handed down.

Boyd v. U. S. 116th U. S. 616, 29th L. Ed. 746;
Weeks v. U. S. 232d U. S. 383, 58th L. Ed. 632;
Gould v. U. S. Supreme Court Advance Opinions,
 April 1st, 1921, page 311, also published in the
 65th L. Ed.

Lawrence Amos v. U. S.—U. S. Supreme Court
 Advance Sheets, April 1st, 1921, page 316, also
 published in 65th L. Ed.

Holmes v. U. S. 275th Fed. 49;

Roy Youman, v. Commonwealth of Kentucky,
 13th A.L.R. page 1303, also found in 224th
 Southwestern, page 860;

State of Wyoming v. Theo. Peterson, 13th A.L.R.
 page 1284;

People v. August Marxhausen, 3d A.L.R., page
 1505;

In Re: Rule of Court, Fed. Cases No. 12,126;

U. S. v. Frieburg, 233d Fed. 313;

In Re: Tri-State Coal Company, 253d Fed. page
 605;

U. S. v. Baumert, 179th Fed. 735;

Beavers v. Hinkle, 194th U. S. 73; (48th L. Ed 82)

U. S. v. Tureand, 20th Fed. 621;

Ex Parte Rhodes, 1st A.L.R. 568;

People v. Glennon, 74th N. Y. Supplement, 794;

State v. Gleason, 4th Pac. 363;

In Re: Kellam, 41st Pac. 960.

Assignment No. 11: Based upon the objection to the introduction of any testimony arose as follows, after the jury had been selected, impaneled, and sworn to try the case. See Transcript of Record Upon Writ of Error, page 52:

“Mr. DISKIN: We waive our opening statement, and call Mr. Brown.

“Mr. MOORE: If the Court please, at this time I object to the introduction of any testimony on the part of any witness as to what was done and what was found or seized in the premises occupied by this defendant in Reno, and as described in the affidavit and in the search-warrant, which are a part of the records in this case, on the grounds that the evidence, and all the evidence on the part of the Government, was secured by reason of an illegal and unlawful search of the defendant's premises, and of his property; that there was no valid or sufficient affidavit filed with the magistrate, or commissioner who issued the search-warrant in question, or showing that probable cause existed that any crime had been, and was being committed, and that the evidence in the possession of the Government in this case was secured in violation of the constitutional rights of this defendant, as provided in the Fourth Amendment to the Constitution of the United States; and that its admission in testimony here will be in violation of the Fifth Amendment to the Constitution of the United States.

“I base this upon the motion in the case, and the proceedings heretofore had. I understand the Court has ruled on that.”

It was maintained by the Court and counsel for

the Government at the trial that, inasmuch as the Court had denied the Motion to Quash the search-warrant and return the property and to suppress and exclude the testimony, such action was determinative of the objection to the introduction of testimony. We maintained there, and we urge here, that an objection to the introduction of evidence secured by the Government in an unlawful manner, and in violation of the Constitutional rights of the defendant, may be successfully interposed at the trial. Cases cited at the close of this subdivision of our Brief are decisive upon this question.

In connection with the question raised in Assignment No. II, and decided under the same authorities hereinbefore referred to, Assignment No. III, which was based upon the objection to the admission of the testimony of H. P. Brown; and Assignment No. IV, which was based upon the objection of the testimony of Nash; and Assignment No. VI, which was based upon the motion to strike the testimony of Brown and Nash from the record; and Assignment No. VII, based upon the objection to the introduction of the testimony of S. C. Dinsmore, may all be considered and determined.

In the case of *Gould v. U. S.* published in Supreme Court Advance Opinions, April 1st, 1921, page 311, certain question were presented to the Supreme Court. The sixth question is as follows:

“If papers of evidential value only be seized un-

der a search-warrant, and the party from whose house or office they are taken be indicted,—if he then move before trial for the return of said papers, and said motion is denied,—is the court at trial bound in law to inquire as to the origin of or method of procuring said papers when they are offered in evidence against the party so indicted?”

The Court says:

“It is plain that the trial court acted upon the rule, widely adopted, that courts in criminal trials will not pause to determine how the possession of evidence tendered has been obtained. While this is a rule of great practical importance, yet, after all, it is only a rule of procedure, and therefore it is not to be applied as a hard-and-fast formula to every case, regardless of its special circumstances. We think, rather, that it is a rule to be used to secure the ends of justice under the circumstances presented by each case; and where, in the progress of a trial, it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an objection to their admission, or a motion for their exclusion, and to consider and decide the question as then presented, even where a motion to return the papers may have been denied before trial. A rule of practice must not be allowed for any technical reason to prevail over a constitutional right.”

The law as enunciated in the *Gould* case, is not limited to the introduction of papers in evidence alone, but extends to the introduction of any matter in evidence, either by way of oral testimony or exhibits that were secured by the Government in an unconstitutional manner.

Weeks v. U. S. 232d U. S. 383; 58th L. Ed. 632;
Gould v. U. S. supra.

Lawrence Amos v. U. S.-U. S. Supreme Court
Advance Sheets, April 1st, 1921, page 316, also
published in 65th L. Ed.

Holmes v. U. S. 275th Fed. 49;

Roy Youman v. Commonwealth of Kentucky,
13th A. L. R. page 1303; also found in the
224th Southwestern, page 860;

State of Wyoming v. Theo. Peterson, 13th A. L.
R. page 1284.

Assignment No. VI, based upon the motion to strike the testimony of Nash and Brown from the Record, there is another question raised than that heretofore presented. That question is, "Was the search-warrant itself a legal search-warrant?" Copy of the search-warrant will be found on page 13 and 14, Transcript of Record Upon Writ of Error.

It is the contention of the plaintiff in error that the search-warrant is particularly deficient for two reasons:

First: That there is no finding of probable cause made by the Commissioner contained in the search-warrant. For this reason the search-warrant itself conferred no authority upon the officers to make the search. Before a commissioner or magistrate can legally issue a search-warrant it is necessary that the magistrate judicially determine that probable cause exists for the issuance of the search-warrant, and such finding of probable cause is similar to the finding and statement of probable cause in a warrant of commitment, or other war-

rant; and in such warrants it is necessary that a finding of probable cause be made.

In Re: Van Campen, Fed. Case No. 16,835;
 U. S. v. Brawner, 7th Fed. Rep. page 86;
 Ripper v. U. S. 178th Fed. 224; Circuit Court of
 Appeals, 8th District;
 De Graff v. the State, 103 Pac. 538;
 Miller v. U. S. 57th Pac. 836;

In the last two cited cases the Oklahoma Court cites the case of Ex Parte Burford, 3d Cranch, 448; 2d L. Ed. 495, and quotes from the opinion by Chief Justice Marshall in the last two mentioned cases, upon the sufficiency of the warrant, as follows:

“It (the warrant) does not allege that witnesses were examined in his (defendant’s) presence, or any other matter whatever which can be the ground of their order to find sureties. If the charge against him was malicious, or grounded on perjury, whom could he sue for malicious prosecution, or whom could he indict for perjury? There ought to have been a conviction of his being a person of ill fame. The fact ought to have been established by testimony. The warrant of commitment was illegal for want of some good cause certain, supported by oath.”

The prisoner was discharged on those grounds alone. The same last two mentioned cases refer to In Re: Rule of Court, Fed. Case No. 12,126, and quotes therefrom, as follows:

“An affidavit made solely upon information derived from others whose names are not given by a person who swears that he has good reason to

believe, and does believe that a certain person, naming him, has committed an offense against the law, describing it, does not meet the requirements of Article IV of the Amendments to the Constitution of the United States. The probable cause mentioned in that Article, which is supported by oath or affirmation, and upon which alone a warrant can issue, must be submitted to the committing magistrate, who must judge of the sufficiency of the ground shown for believing the accused party guilty. The magistrate, before issuing a warrant, should have before him the oath of the real accuser to the facts on which the charge is based, and on which the belief or suspicion of guilt is founded."

Second: The search-warrant was invalid for the reason that no direction or instruction contained therein authorizing and directing the officer serving the same to either arrest the person in possession of the premises or of the property sought to be seized, and that there was no direction that the property be brought before the Commissioner.

White v. Wagner, 50th L.R.A., page 60, and other cases hereinbefore cited.

Assignment No. VIII: "That the Court erred in overruling defendant's motion made in said cause, in which defendant renewed the motion made before Anna M. Warren, the Commissioner, to quash, set aside and hold for naught the search-warrant issued by Anna M. Warren on the 9th day of April, A. D. 1921," raises the question as to whether or not the District Court has the right or will review any pro-

ceedings before the Commissioner; that the trial court has the power to review the acts of the Commissioner, we think, is determined by the following authorities:

Brawner v. U. S., 7th Fed. page 86;
 Ex Parte Ballman, 8th U. S., pages 75, 114;
 In Re: Martin, Fed. Cases, No. 9,151;
 U. S. v. Shepherd, Fed. Cases No. 16,273;
 In Re: Buford, Fed Cases, 2,148;
 Foster's Fed. Practice, Vol. 2, Sec. 488, page 1623.

III.

Assignment of Error IX, aside from the question hereinbefore discussed, raises the question of the legality of the search, even presuming that a valid search warrant was in possession of the officers. It is based upon the motion made in this case in the District Court to quash the search-warrant, for the return of the property, and the suppression of the evidence. This motion (see Transcript of Record Upon Writ of Error, page 8) was supported by the affidavit of Geo. H. Bachenberg, the defendant. Transcript of Record Upon Writ of Error, page 10, in which affidavit was set out the manner of the search from which affidavit it appears that the defendant was in his place of business, and that the officers rushed in, leaped over the counter, or front bar, and overpowered the defendant, and completed their search of that portion of the premises and their seizure of the liquors in question in a forcible

and riotous manner. While they were in possession of a search-warrant (which we contend was invalid and insufficient for the reasons hereinbefore stated) yet they conducted their search in a manner not warranted by the search-warrant, and as though they were not in possession of one. We earnestly contend that it is the duty of officers of the law in the execution of a valid search-warrant to proceed in an orderly manner, and to do as little damage to the property being searched as possible and to treat the party in possession with due and proper consideration. It is their duty to make known to the party in possession of the premises that they are officers of the law in possession of valid authority for the search of his property or the seizure thereof, or the seizure of his person. Then, if resistance be made, they are justified in using force, but not otherwise. This position we maintain is supported by the long line of authorities hereinbefore cited in this Brief.

In view of the questions raised herein upon the Writ of Error and upon the authorities herein cited, the plaintiff in error should prevail and the cause be remanded to the District Court with directions to quash the search-warrant and to exclude and suppress all testimony secured thereby, and the action be dismissed.

Respectfully submitted,

M. B. MOORE,
Attorney for Plaintiff in Error.

No. 3723

United States
Circuit Court of Appeals
For the Ninth Circuit

G. H. BACHENBERG,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Brief for Defendant in Error

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Attorneys for Defendant in Error.

Filed this.....day of February, A. D. 1922

FRANK D. MONCKTON, Clerk.

By.....
Deputy Clerk.

FILED

FEB 25 1922

F. D. MONCKTON,
CLERK

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Brief for Defendant in Error

A statement of the facts in this case, essential for consideration in connection with the contention of Plaintiff in Error, will be deferred, until, by reason of points presented it will be advantageous to present the facts with the law.

The points urged by Plaintiff in Error, in this case, are almost identical with the contentions made before this Court in case No. 3722, U. S. v. E. Vachina and the answering Brief, of necessity, therefore, will be to some extent, a reiteration of the arguments

made by the Government in the Vachina case.

PLAINTIFF IN ERROR'S CONTENTION.

It is earnestly insisted as grounds for a reversal of the judgment that,

(a) The affidavit for the issuance of a search warrant is insufficient because of the failure to state therein facts sufficient to establish probable cause and that by reason thereof the search warrant was void.

In presenting this contention to the lower Court, there was filed a motion to quash the search warrant before the U. S. Commissioner who issued the same, which motion was denied by the Commissioner.

(b) The action of the United States Commissioner in denying the motion to quash the search warrant was attempted to be reviewed in the District Court and the refusal of the District Court to entertain the motion is alleged as error.

(c) Thereafter a motion to quash the search warrant issued by the U. S. Commissioner was filed in the District Court after the indictment was returned and it is alleged that the Court erred in denying said motion.

(d) The insufficiency of the affidavit for the issuance of a search warrant was again attacked by objections interposed to the testimony of witnesses Nash and Brown upon the trial of the case.

(e) The search warrant was illegal.

While Plaintiff in Error enumerates a ground of error predicated upon Assignment of Error No. 5, from the absence of any lengthy discussion in his Brief under this heading, it is to be presumed that

the same is not urged with much seriousness.

It is contended under this assignment that:

(f) The Court erred in its refusal to permit counsel for defendant to inquire of Nash, a witness for the Government, during the trial of the case, upon cross-examination, as to his actual knowledge of the alleged facts and statements made in the affidavit for search warrant.

(g) Assuming a valid affidavit was filed and a legal search warrant issued, that the search and seizure was unlawful for the reason, that, prior to the search and seizure, the officers did not present to Plaintiff in Error the search warrant issued in the case and did not advise him that they were officers and had in their possession a valid search warrant.

GOVERNMENT'S CONTENTION

In opposition to Plaintiff in Error's theories, we submit:

(1) That the affidavit was sufficient upon which the search warrant issued.

(2) That under the facts as shown by the testimony no search warrant was required.

Plaintiff in Error assumes the burden of establishing, not only that the affidavit for search warrant was insufficient, but also, that he does not come within the exception which permits the seizure of property without a search warrant; the latter excluding the necessity for a search warrant and predicated the officer's right to seizure upon the theory of a crime being committed in his presence.

If the contentions of the Government as enumer-

ated above are correct, it will obviate a determination by this Court of the other alleged errors with the possible exception of the one stated under assignment No. 5, for the reason that the other assignments are based upon the theory that neither of the Government's two contentions are supported in law or in fact.

The material part of the affidavit for search warrant in this case which is attacked reads thusly:

"That the facts, circumstances and conditions of which affiant has knowledge and as ascertained by affiant are as follows, to-wit: Direct information to affiant by a citizen of Reno whom affiant has known for a long time and whom affiant believes to be absolutely truthful and reliable, that liquor is being sold over the bar at said premises, and that said informant purchased a drink there on this date. That affiant and agent H. P. Brown have watched said premises and on one occasion saw two parties coming away from said premises under the influence of liquor."

It is respectfully urged that this recital in the affidavit was sufficient to warrant a finding of probable cause by the commissioner.

The essential elements in the finding of probable cause are:

- (a) Credibility of the party making the charge.
- (b) Sufficient facts stated from which probable cause can be determined.

Plaintiff in Error has cited a number of authorities wherein the Courts were called upon to determine the sufficiency of statements contained in affidavits for the issuance of a search warrant. A reading of these cases reveals that the party mak-

ing the affidavit gave to the commissioner his conclusions instead of the facts upon which he arrived at conclusions.

In determining the sufficiency of the statements, contained in these affidavits, the Courts have observed that probable cause could not be established by the statements of conclusions purely, of the party making the affidavit. That, therefore, the facts which force the affiant to the conclusion must be stated to the magistrate.

It will be noted from the affidavit in the instant case, that the facts were stated to the commissioner, to-wit: That on the day upon which the information was given to affiant, the party giving the information "Had purchased intoxicating liquors on the premises of the defendant." This is not a conclusion, but a statement of a positive fact from which the commissioner could correctly decide that probable cause existed for the issuance of a search warrant.

It will be noted from the affidavit that the name of informant was not stated, but a statement of the facts were set forth which established the credibility of the informant to a greater degree than the giving of informant's name could possibly have done.

Suppose the informant in this case was a stranger to the officer and the commissioner. It would be difficult for the Commissioner to determine the truthfulness of the accusation. The recital by Nash, who made the affidavit, to the commissioner, that the party who gave him the information was a citizen of Reno and known to him for a long time and for these reasons affiant could vouch for his veracity, must be considered of greater weight in establishing

credibility, than advising the commissioner of the name of the informant.

In addition to the facts recited by informant the affidavit recited that an independent investigation was made by the Prohibition Officers and that two persons were seen coming away from said premises under the influence of liquor. This statement by itself, may, or may not, be sufficient to establish probable cause, but taken into consideration with the statement made by informant, it tends to corroborate the same and is entitled to be given some weight by the magistrate in arriving at his conclusion as to whether or not probable cause was established.

What deduction would be drawn by the ordinary individual from the fact that he saw intoxicated men coming from the premises where soft drinks were kept for sale. Could he reason without fear of his logic being seriously questioned, that intoxicated men were frequenting these places to purchase soda-water and soft drinks? Certainly he would conclude as a reasonable man that the place from which these parties came was selling or giving away intoxicating liquor.

We respectfully submit that a Judge or Commissioner, is not required to warp his reasoning powers and close his eyes and ears to the consideration of facts which would lead reasonable and prudent men to a just conclusion.

The rule of law sought to be applied by Plaintiff in Error to test the sufficiency of facts in establishing probable cause for the issuance of a search warrant would compel the Government, in all cases, to set forth statements establishing the truth of the same beyond a reasonable doubt. This, we submit is

not the correct test. A test of this character would exclude the issuance of a search warrant where the evidence was entirely circumstantial. It cannot be said that the rule in reference to search warrants is more stringent than the rule which is applied by the Courts in issuing warrants for arrest.

The ordinary citizen is not prone to assist officers in the enforcement of the law and the citizen is an exception who will make and file an affidavit before a Commissioner for the issuance of a search warrant.

The individual feels no doubt, that his duty to society is discharged when he gives to the officer information respecting the law's violation. What can the officer do under these circumstances? Certainly no more than was done in this case where it is disclosed that the premises were watched by the Prohibition Officers and when corroborating facts were discovered, to-wit: witnessing intoxicated men coming from the premises that sufficient facts were then in their possession to establish probable cause for the issuance of a search warrant.

The language of the Supreme Court of Wisconsin upon the subject in the case of the State vs. Davie, 22 Northwestern, 411, appeals to us as containing good, sound logic. The Court stated:

“In reference to the authorities that may hold that in all cases before an accused person can be arrested for crime a complaint must be made in positive terms and by a person who knows of all the facts constituting the offense, we are free to say that they are unreasonable, if nothing more. There would be, and could be, but very few arrests under such a rule. Crime frequently rests upon

circumstantial evidence, and very numerous facts in the knowledge of numerous persons, and all such witnesses could not be speedily and summarily brought before the magistrate to make complaint, and they could not be compelled to do so if they could be found... * * * The rule contended for would make the execution of the criminal laws impractical if not impossible, and many offenders would escape justice. It would be a very humane and safe rule for the criminal, but cruel and unsafe for society. The complainant may be in possession of such facts, by information or otherwise, as would give him good reason to believe that a certain person had committed an offense, and the persons who have knowledge of the facts of the crime may be either unable or unwilling to make complaint. What shall be done? Our statute sufficiently guards and protects the rights of accused persons, and, if strictly followed, there will be no danger of wanton or causeless arrests, and it is by our own statute that this complaint is to be tested." *State v. Davie* 62 Wis. 305, 309, 22 NW 411.

See also *Beavers v. Henkel*, 194 U. S., p. 73; 40 Law Addition 882.

Rice v. Ames, 180 U. S., P. 371; 45 Law Edition 577; *Wiley v. State* 170 Pac. 869;

Ocampo v. U. S., 58 Law Edition 1231;

Griswold v. Griswold, 77 Pac. 672; 32 Cyc. 402.

(2) That under the facts as shown by the testimony, no search warrant was required.

The issues in this case were submitted to a jury entirely upon the testimony of Government witnesses, and it is established thereby that on the 9th of April, 1921, Plaintiff in Error was operating what was designated as the Palace Bar. On the evening of the 9th of April, Prohibition Officers Nash and

Brown entered the premises. Five customers were lined up in front of the bar and twenty or thirty people were in the bar-room proper. When the Plaintiff in Error saw the prohibition agents in the saloon he made a run for the end of the bar facing the street. The prohibition officers then jumped over the bar and saw the Plaintiff in Error make a kick at a bottle which was in close proximity to a hole or trap in the floor. The agents and Plaintiff in Error had a tussle and all went to the floor. When Plaintiff in Error was permitted to get up he made another effort to destroy the evidence by kicking the bottle down the hole. He even called to parties on the other side of the bar to break the bottle. This bottle was taken by the officer and the testimony establishes that it contained 41.9 per cent. alcohol and was fit for beverage purposes.

It further appears that near the center of the bar and in close proximity to the drainboard there was a hole cut in the floor ten inches square. In the cellar directly under this hole there was a large pile of rocks. This portion of the cellar was enclosed by a locked compartment.

When the Plaintiff in Error saw the Prohibition Officers, he endeavored to reach the bottle that was on the floor containing the intoxicating liquor and kick it down the hole upon the rock pile in the cellar, thereby destroying the evidence.

We have here a state of facts which conclusively establishes that Plaintiff in Error designedly and with premeditation set about to engage in the unlawful business of possessing and disposing of intoxicating liquors. He had a contraption erected in his place of business viz: a hole in the floor and a pile of

rocks underneath in the cellar, for the purpose of destroying the evidence in the event of a raid by prohibition officers.

The testimony establishes a condition of facts, showing an utter disregard for the Prohibition Law and an intended design to openly flaunt its provisions. The Plaintiff in Error, however, with all the facts stated above admitted, now urges that his constitutional right has been invaded by an unlawful search and seizure.

We submit it is ludicrous for Plaintiff in Error under this state of facts to urge that by virtue of any provision of the constitution he is immune from search and seizure. The officers saw his customers at the bar. They saw Plaintiff in Error running to the other end of the bar to seize the liquor that was on the floor, which action plainly indicated a consciousness of guilt.

Under these circumstances, it is respectfully submitted that a crime was committed in the presence of the officers and they had a right, without a search warrant, to arrest the defendant and take into their possession the intoxicating liquor. Their entry upon the premises was not a trespass. This was a place of business where anyone could go without the owners consent. Having, therefore, the right to enter, they were authorized to seize the liquor used by Plaintiff in Error without having a search warrant.

(See Sections 25 and 33, Title II, N. P. A.; Sullivan v. United States No. 3637, Circuit Court of Appeals 9th Circuit, decided Dec. 5th, 1921.

U. S. v. Borkowski, 268 Federal, 408;

U. S. v. Murphy 264 Federal, 842;

U. S. v. Welch, 247 Federal, 239.)

(b) The action of the United States Commissioner denying the motion to quash the search warrant was attempted to be reviewed in the District Court and the refusal of the District Court to entertain the motion is urged as error.

Answering this contention we submit: That the United States Commissioner is an arm of the District Court and the District Court has no authority to review its own decisions.

(U. S. v. Moresca, 266 Federal 713.)

It is next urged by Plaintiff in Error:

(6) That thereafter a motion to quash the search warrant issued by the United States Commissioner was filed in the District Court after the Indictment was returned and it is alleged that the Court erred in denying said motion.

Replying to this statement, it is our position that the affidavit for search warrant was sufficient and, if it were not, the evidence discloses that a crime was committed in the presence of officers and they had a right to make the arrest and seize the liquor, and for these reasons no error was committed in denying the motion. If the lower Court was not authorized to review the action of the United States Commissioner in its refusal to quash the search warrant it must logically follow that an independent motion made in the lower Court for the purpose of quashing the search warrant was not proper. This action would require the Court indirectly to review the Commissioner's order.

Plaintiff in Error had a remedy in the lower Court which afforded him complete relief but he failed to pursue it. The doctrine is established be-

yond question that where a search is unlawful or where the affidavit for search warrant is insufficient, the proper remedy is by petition for return of property taken under unlawful seizure.

(Weeks v. U. S., 232 U. S. 383, 58 Law Edition 632; Boyd v. U. S., 116 U. S. 616, 29 Law Edition 746).

It is also insisted by Plaintiff in Error:

(d) That the lower Court erred in not sustaining an objection to the testimony of Nash and Brown during the trial of the case.

If we are right in our statement of the law that one must preserve his right where property is alleged to have been unlawfully taken, by petitioning the Court for its return before trial, it is respectfully submitted that the rule of law is well established that the Court will not stop during the trial to ascertain whether or not the testimony was lawfully or unlawfully obtained.

It is further contended:

(e) That the search warrant was illegal.

In the lower Court the only objection taken by Plaintiff in Error to the search warrant was that it was void for the reason that the affidavit upon which it issued was insufficient. Plaintiff in Error, at no stage of the proceeding, objected to the search warrant for any alleged insufficiencies in the search warrant itself and we therefore respectfully submit that Plaintiff in Error is not now in position to urge that the search warrant was or is insufficient by reason of any defect or recital, or lack of recital in the search warrant itself.

As we have heretofore noted, Plaintiff in Error has not urged with much seriousness the error enum-

erated under Assignment No. five. This assignment is set forth in subdivision (f) and states:

(f) Refusal of the Court to permit counsel for defendant to inquire of Nash, a witness for the Government, during the trial, as to his actual knowledge of the facts and statements made by him in the affidavit upon which the search warrant issued

No doctrine of law is better settled than the one which enunciates the rule that the Court will not stop in the middle of a trial and go into a collateral issue made by reason of some objection interposed based upon testimony which may or may not have been unlawfully obtained.

(U. S. v. Weeks, 232, U. S. 383).

(Boyd v. U. S., 116 U. S. 616, 29 Law Edition, 632).

The last contention made by Plaintiff in Error is stated under subdivision (g) which recites:

(g) Assuming a valid affidavit was filed and a legal search warrant issued, the search and seizure was unlawful for the reason that prior to the search and seizure the officer did not present to Plaintiff in Error the search warrant issued and did not advise him that they were officers and had in their possession a valid search warrant.

It may be useful in discussing this point to refer to the testimony of Agent Nash, Transcript of Record, page 73, where the following matters were testified to by him:

Mr. DISKIN: Why didn't you present your search-warrant to Mr. Bachenberg prior to your going over the bar?

Mr. MOORE: If the Court please, I object to

the question as not proper cross-examination, and it is irrelevant at this time.

The COURT: The objection will be overruled.

Mr. MOORE: Give us the benefit of an exception.

WITNESS: I had no opportunity to do so. To present a search warrant it is necessary that the man will take it; I can't pass the search warrant through the air to him, when he is running.

Mr. DISKIN: When you first saw Mr. Bachenberg on this occasion what was he doing?

A. At the very instant that we entered the door, before he turned his back in our direction, he was standing at the upper end of the bar serving a drink but as soon as Mr. Brown and myself came inside, he left his position and started running down the length of the bar on the inside; and then the two struggles that were spoken of previously took place. As soon as the second struggle was over and Mr. Backenberg rose to his feet, I told him I had a warrant; he says, "I know that," he says, "I know you, and you would not be here without a warrant," or words to that effect. (71). I said, "All right then." Then he went right ahead. I told him I would give him a copy of it, and I also told him I would give him a receipt for the liquor that we seized; I did before we parted company, but I didn't give him a receipt behind the bar for the liquor, because of the fact that we were not through with our search; we went into the cellar and spent fifteen minutes down there. Before we parted company, though, I gave him a copy of the warrant, and also gave him a receipt for the liquor seized.

Q. In the conversation which you had with Mr. Bachenberg, did he state anything with reference to whether or not he knew you?

A. He said he knew me, yes, knew who I was. I judged from what he said he must have known me, because the first thing he said was, "I know who you are; that is all right"; that is the way I think he put the answer to my statement that I was an officer with a warrant; he said, "I know who you are, and that is all right."

(Transcript of Record pages 73, 74 and 75).

This testimony, which is not contradicted, reveals that Nash and Brown were known to Plaintiff in Error as Prohibition Officers and from his actions, when they entered the premises, it is disclosed that he knew the purpose of their visit.

The rule is well settled that where the party, to be arrested knows the officers, it is not necessary for them to exhibit to him the warrant. The leading case on this subject is that of U. S. v. Rice, 27 F Cas. No. 16, 153 where the Court stated:

"A known officer, in attempting to make an arrest by virtue of a warrant, is not bound to exhibit his warrant and read it to a defendant before he secures him, if he resist; if no resistance is offered, the officer ought always, upon demand made, show his warrant to the party arrested or notify him of the substance of the warrant, so that he may have no excuse for placing himself in opposition to the process of the law. This is only a rule of precaution. A defendant is bound to submit to a known officer; to yield himself immediately and peaceably into the custody of an officer before the law gives him the right of having the warrant read and explained; when in resistance, the law shows him no favor. A defendant, knowing the arresting party to be an officer, is bound to submit to the arrest, reserving the right of action against the officer in case the latter be in the

wrong." U. S. v. Rice 27 F Cas. No. 16, 153, 1 Hughes 560, 564.

Another leading case which does not differentiate between the lack of knowledge or knowledge of the party to be arrested as to the identity of the officer is State v. Townsend, 5 Delaware, 488. This Court states the following doctrine:

"It was not necessary for him either to produce his warrant or state his character and authority before making the arrest. The arrest itself is the laying hands on the defendant; and it might be defeated by the ceremony of production and explaining a paper before the arrest is made. It is quite time to produce the authority on the demand of the party arrested, and after the arrest. Every one is bound to know the character of an officer who is acting within his proper jurisdiction and every citizen is bound to submit peaceably to such officer, until he can demand and investigate the cause of his arrest. If the officer have no proper warrant for the arrest, he is liable to the defendant, who can suffer no wrong from submitting to the law; but if he resist before such investigation, and the officer have authority, he is indictable for obstructing such officer in the discharge of his duty."

In the case of O'Halloran v. McQuirk, 167 Federal, 493, it is stated:

"An officer is not bound to exhibit his warrant to the person whom it authorizes him to arrest until asked for."

If it is the law that, under facts as shown to exist in the instant case, an officer before making a search must exhibit his warrant, then we submit that the violators of the Prohibition Law may continue in

their unlawful business without fear of prosecution.

Such a rule places a premium on the unlawful acts of a person in the destruction of evidence.

Such a rule sanctions and rewards the diligence of one who makes successful devices for the law's infractions.

Such a rule punishes a person not for violating the law, but for getting caught in its violation.

We urge in conclusion that it is established by record in this case that Plaintiff in Error, with predetermination, advisedly set about to violate the law, and, to prevent detection, constructed devices to foil the officers in the event of a raid.

Such conduct cannot meet with the approbation of the Court and certainly the constitutional provision in reference to search and seizure, does not afford protection to the tools of a burglar, or the corpus of a crime.

The search and seizure provision of the constitution, we respectfully submit, is not to be interpreted so as to absolve the guilty from just punishment or to furnish aid and assistance to the criminal by impeding the due and lawful enforcement of laws.

We respectfully urge that judgment of the lower Court should be affirmed.

M. A. DISKIN,
Assist. U. S. Attorney,

WILLIAM WOODBURN,
U. S. Attorney.
Attorneys for Defendant in Error.

No.

3725

United States
Circuit Court of Appeals
For the Ninth Circuit.

IN RE ALFONSO CABRILLOS et alias, an infant,
LOUISA CABRILLOS,

Appellant,

vs.

EMILLIO ANGEL and CHONITA ANGEL, his
wife,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for
the Southern District of California,
Southern Division.

FILE

JUL 25 1921

R. D. MONKTON,

CLERK.

No.

United States
Circuit Court of Appeals
For the Ninth Circuit.

IN RE ALFONSO CABRILLOS et alias, an infant,
LOUISA CABRILLOS,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys.

For Petitioner and Appellant:

F. C. AUSTIN, ESQ.,

R. C. NOLEMAN, ESQ.,

308 Bullard Bldg., Los Angeles, Calif.

For Respondents and Appellees:

GEORGE A. HOOPER, ESQ.,

401 California Bldg., Los Angeles, Calif.

United States of America, ss.

To EMILLIO ANGEL and CHONITA ANGEL,

RESPONDENTS,

GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 15th day of July A. D. 1921, pursuant to an appeal duly allowed by the District Court, the order therefore on file in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain Habeas Corpus Cause No. 2996 (Cri.) wherein Louisa Cabrillos, Petitioner on behalf of Alfonso Cabrillos, et alias, is Appellant, and Emillio Angel and Chonita Angel are Respondents, Appellees and you are required to show cause, if any there be, why the decree dismissing said writ in the said cause mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Oscar A. Trippet
United States District Judge for the Southern
District of California, this 17th day of June, A.
D. 1921, and of the Independence of the United
States, the one hundred and forty-fifth

Trippet

U. S. District Judge for the South-
ern District of California.

[Endorsed]: No. 2996 (Cri.) *In the United States Circuit Court of Appeals for the NINTH CIRCUIT In re ALFONSO CABRILLOS, et aliases, an infant, LOUISA CABRILLOS, Petitioner, Appellant, vs EMILLIO ANGEL, et ux., Appellees.* Citation F. C. Austin and R. C. Noleman 307-8-9 Bullard Bldg., Phone 15497 Attorneys for Appellant. Received copy of the within Citation, this 21st day of June, 1921. Geo. A. Hooper Attorneys for Respondents, Appellee's. Filed Jun 24 1921 *CHAS. N. WILLIAMS, Clerk* Douglas Van Dyke, *Deputy*

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT, SOUTHERN DIVISION
OF THE STATE OF
CALIFORNIA.

	: PETITION
IN-RE: ALFONSO CABRILLOS,	: FOR A WRIT
ALSO KNOWN AS ALFONSO	: OF HABEAS
ORTEGA AND AS GERARDO	: CORPUS ON
ALFONSO ANGEL, an infant.	: BEHALF OF
	: SAID
	INFANT.

TO THE HONORABLE, THE DISTRICT COURT
OF THE UNITED STATES FOR THE SOUTH-
ERN DISTRICT, SOUTHERN DIVISION OF THE
STATE OF CALIFORNIA:

YOUR PETITIONER, LOUISA CABRILLOS, a
feme sole, a spinster, a native *bron* citizen of the

United States, domiciled within the Southern Division, Southern District of the State of California, viz, a resident of San Diego County, State of California:

Humbly complaining, shows to this Honorable Court, that complaint is made on behalf of an infant child of tender age, namely of the age of two years and eight months or thereabouts, whose true name is ALFONSO CABRILLOS, but who sometimes has been known as ALFONSO ORTEGA, and who is now known and denominated as GERARDO ALFONSO ANGEL:

And for cause of complaint in behalf of said infant child aforesaid Your Petitioner complaining avers:

That the said infant child aforementioned, by whatever name he may be known or designated, is now and at this time is being unlawfully detained, restrained, imprisoned and deprived of his liberty by one EMILIO ANGEL, the said Emilio Angel being aided and assisted in the detention of the aforesaid child by Chonita Angel, wife of the said Emilio Angel, and that the said EMILIO ANGEL and CHONITA ANGEL, at this time unlawfully detain and deprive the said infant child aforementioned of his liberty within the Southern District of California, and within the Southern Division, to-wit at and within the City and County of Los Angeles, State of California.

Complaining further your Petitioner avers that Emilio Angel and Chonita Angel are and each of them now are and have been at all times hitherto natives of and citizens of the Republic of Mexico, temporarily so-

journing within the Confines of the United States and within the Jurisdiction of this Honorable Court:

Your Petitioner further avers that she is the mother of said infant child, and that said child was born to Your Petitioner out of wedlock, and that said child was born on the 3rd day of October, 1918, at Los Angeles, Los Angeles County, State of Calif.; That said child was born a citizen of the United States, entitled to all and singularly, the rights, privileges and benefits of a Citizen of the United States:

Your Petitioner further avers that by sham, subterfuge, fiction inadvertance, unlawful and unwarranted proceedings, being had and done as will more fully *appear* hereinafter, the said infant child has been deprived of his right of citizenship and has been expatriated, and is now being detained and deprived of his liberty and unlawfully detained, and by said sham, fiction, unlawful and unwarranted proceedings expatriated held and so deprived of his liberty by the said Emilio Angel and the said Chonita Angel, and that said infant child has been so detained by said parties aforesaid, since about the 19th day of June, 1919. Your Petitioner, complaining, show to this Honorable Court, that on or about October 16th, 1918, at a time when your petitioner was weak in body and mind, covered with shame, without funds and incapable of the transaction of any business of any nature; the said infant child, the child born of the body of your Petitioner, became intrusted to the CHILDRENS HOME

SOCIETY OF CALIFORNIA, the branch thereof at Los Angeles, California:

That as to the manner of said intrusting or what occurred, your Petitioner at said time was in such condition *mentaly* and *physicialy*, that she, Your Petitioner was entirely *unconscience* of what occurred or of what did not occur: That any agreement which may have been entered into by your petitioner concerning or relating to said infant child, or if any agreement was made, of and concerning said infant child, such agreement was not made understandingly by your petitioner; Further *avering* that at said time, October 16th, 1918, your petitioner was not *physicialy* or *mentaly* capable of understanding, such agreement or any agreement or capable of transacting any business of any nature at all:

Your Petitioner further avers that at no time or at any time or in any manner at all, has this Complainant, Your Petitioner, knowingly surrendered or released her claim of said infant child:

That Your Petitioner has at all times since the birth of said infant child been desirous of recovering him, the said child, That Your Petitioner is the lawful custodian of said child and that said child is now detained of its liberty and expatriated without the consent and against the will, wishes and desires of Your Petitioner, and this honorable court is asked to restore said child to the custody of Your Petitioner and to restore said infant child to its rights and privileges as a citizen of the United States:

Your Petitioner further avers that she within a few weeks after October 16th, 1918, and upon her recovery sought the said infant child, and for more than one year thereafter, Your Petitioner was entirely without information as to the whereabouts, or as to whether said infant child was living or dead:

That within the last few months, Your *Petitioner* became informed that on the 19th day June, 1919, by a *prceedings* had in the Superior Court of the County of Los Angeles, State of California Known and numbered as cause B;74,835, a complete transcript of said proceedings is made a part hereof marked Exhibit "A". That by said exhibit it is made to appear that the said infant child by decree of court was adopted by the said Emilio Angel with the consent of Chonita Angel, his wife, as the child of the said Emilio Angel and wife, they being then citizens aliens owing *there* allegiance to the Republic of Mexico, sojourning but temporarily within the confines of the United States as heretofore herein averred:

That by such proceedings had and done, the said infant child was expatriated and divested of all his rights of citizenship of the United States and the United States deprived of one of its citizens, that the inherent rights and privileges of citizenship, the right to participate in public affairs, in political affairs, in public activities, the right of suffereage, and all the inherent rights conferred upon citizens of this Government, were by the aforesaid, sham, fictitious, unlawful and unwarranted proceedings, taken from said infant child, and

the said infant child has been deprived and divested of citizenship of the United States:

That said pretended adoption works an expatriation of a native born citizen of the United States of one incapable of consenting and conferrs and transferrs the custody of a native born infant citizen of the United States to an alien and to one who owes allegiance to a foreign power:

That by the aforesaid adoption the laws of the United States are violated and public policy disregarded:

That the Court making said decree is wholly without jurisdiction and without jurisdiction to expatriate a citizen of the United States or to abridge any right of citizenship, and that said decree of adoption was and is fiction, sham, unlawful, unwarranted and void ab initio:

Your Petitioner further shows to the court that the said Emilio Angel and Chonita Angel now hold said infant child and claim that said adoption is in force and are about to take said infant to the Republic of Mexico.

Your Petitioner is informed and *belives* and on such information avers that the pretended adoption was made under certain ordinances, statutes and codes of the State of California, and are as follows, viz:

Section 221 Civil Code:

“CHILD MAY BE ADOPTED. Any minor child may be adopted by any adult person, in the cases and subject to the rules prescribed in this chapter.”

Section 222 Civil Code:

“WHO MAY ADOPT. The person adopting a child must be at least ten years older than the person adopted.”

Section 227 Civil Code:

“JUDGE’S ORDER WHERE FILED, The court must examine all persons appearing before it pursuant to the last section, each separately and if satisfied that the interest of the child will be promoted by the adoption, it must make an order declaring that the child shall thenceforth be regarded and treated in all respect as the child of the person adopting.

The petition, agreement, consent, and order must be filed and registered in the office of the County Clerk in the same manner as papers in other special proceedings.”

Section 228 Civil Code;

“EFFECT OF ADOPTION. A child, when adopted, may take the family name of the person adopting. After adoption, the two shall sustain towards each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation.”

Section 229 Civil Code:

“EFFECT ON FORMER RELATION OF CHILD. The parents of an adopted child are, from the time of adoption, relieved of all parental duties toward, and all responsibility for the child so adopted.”

Your Petitioner avers that she is informed and *belives* and on such information and belief says that the afore-

said sections of the Civil Code of the State of California, are each and every one of them contrary to the Constitution of the United States, the Statutes of the United States and in violation of all rules and regulations relative to citizens and citizenship of the United States: That said sections of the *Civil* Code aforesaid work an expatriation of said infant child and are in derogation of common, constitutional and statutory law.

Your Petitioner is advised and therefore avers that said sections of the Civil Code of the State of California are contrary to the Fourteenth Amendment to the Constitution of the United States, To-wit:

XIV AMENDMENT

“SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United *Sates*; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

Your petitioner further avers that said sections of the Civil Code of California are contrary to the Fifteenth Amendment to the Constitution of the United States, to-wit:

XV AMENDMENT.

“SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”

Your Petitioner further shows to this Honorable Court that said Emilio Angel and the said Chonita Angel are not suitable persons to have the custody of said minor child, in this that the said persons last named are violators of the laws of the United States and are not law abiding persons; further *avering* that heretofore on or about the day of April 1921, before this Honorable Court the said Emilio Angel entered a plea of guilty to a charge of high grade misdemeanor and was adjudged guilty on said plea and adjudged to pay a fine of \$300.00:

That the acts and conduct of the said Emilio Angel and Chonita Angel while domiciled within the United States have been such, that as your petitioner is informed and *belives* and so says on such information and *belives* as to preclude them and each of them from ever becoming citizens, even if it was their desire to become citizens of the United States.

Your Petitioner further avers that she is informed and believes and therefore avers that said Emilio Angel and Chonita Angel, have threatened to and are about to depart from the jurisdiction of the United States and to return to the Republic of Mexico, of which country they and each of them are citizens, and

that they proposed to and are about to take with them the said infant child ALFONSO CABRILLIOS:

Your Petitioner further avers that she is informed and *belives* and so says on information and belief that the said Emilio Angel and the said Chonita Angel are without fear of contempt of court, and are without fear or respect of the effect of Court Proceedings. and are without respect and have no respect for the laws, rules, customs and regulations of the United States Government, and that they and each of them have threatened if proceedings are taken towards the securing of said infant child, that they will take said child and flee to the Republic of Mexico, charging that they have declared that they will have no fear of being dispossessed of said child on their arrival upon Mexican soil.

Your Petitioner further avers that she is advised, informed and *belives* that in the event process of court is served upon the said Emilio Angel and Chonita Angel in any matter touching the custody of said minor child, that they, the said Emilio Angel and Chonita Angel will evade, disregard and attempt to thwart the effect of such proceeding by resorting to flight and attempt to remove the said infant child from the jurisdiction of the court by fleeing to the Republic of Mexico:

That on account of the nearness and *accessibility* to the Republic of Mexico, it is comparatively a matter without any great difficulty for the said Emilio Angel

and Chonita Angel, together with said infant child to reach the Republic of Mexico of which Country, they and each of them are citizens and owe their allegiance and will pretend that said Infant Child is also a citizen. Your Petitioner further represents that it is for the best interest of said child that it be restored to Your Petitioner,

That Your Petitioner resides at.....
in San Diego County, California, that she resides with her father, the Grand-father of said child, and that the Grand-father owns in his own right.....
acres of land, and that said land, ranch is stocked with horses, cattle and domestic animals and that Your Petitioner is in interest with her father, and that the Grand-father is desirous and anxious of having the custody of said child in your Petitioner in order that he may see to the care, custody and education of the said infant child Alfonso Cabrillos:

WHEREFORE, It is prayed that the Honorable Court assume jurisdiction,

That a Writ of Habeas Corpus Issue for said infant child, and that a day certain be fixed:

That said writ be served upon the said Emilio Angel and Chonita Angel, that they show cause why said child is held by them.

That this Court make an order directing the United States Marshall of this District to take possession of the said infant child Alfonso Cabrillos and to retain said child in his custody until the final day of hearing. That on the final hearing that said child be awarded

to your Petitioner and for such other and further orders as may be meet and proper in the premises and in conformity to the regulations of this honorable court and in keeping with the constitutional rights of citizens of the United States.

And for which your Petitioner forever prays.

Louisa Cabrillos

attest F. C. Austin &
 R. C. Noleman
 her attorneys.

NO B-74835

SUPERIOR COURT
LOS ANGELES COUNTY

IN RE ADOP. OF

Plaintiff,

-vs-

ALFONSO ORTEGA,

Defendant.

J U D G M E N T R O L L

FILED AND ENTERED JUN 23, 1921
IN BOOK 472 PAGE 300
H J LELANDE, Clerk,
By W. B. Hitchcock, Deputy.

IN THE SUPERIOR COURT OF THE STATE
OF CALIFORNIA, IN AND FOR THE
COUNTY OF LOS ANGELES.

--- oOo ---

IN THE MATTER OF THE)	
ADOPTION OF ALFONSO)	PETITION FOR
ORTEGA,)	ADOPTION.
A Minor.)	

--- oOo ---

To the Honorable Superior Court of the State of
California, in and for said County:

The petition of Emilio Angel and Chonita Angel
of said County respectfully shows:

I.

That Emilio Angle is of the age of 32 years and
that Chonita Angel is of the age of 30 years; that
they are residents and each of them is a resident of
the County of Los Angeles, State of California; that
they have been united in marriage for 12 years last
past, and they now reside with each other in said
County and State.

II.

That Alfonso Ortega was born to Randolph Ortega
and Louisa Ortega, husband and wife, on the 3rd
day of October, 1918, That Randolph Ortega, father
of said minor, is now deceased.

III.

That Louisa Ortega, mother of said minor child,
Alfonso Ortega, by an instrument in writing, duly

acknowledged as required by law, relinquished and abandoned said minor child unto the Children's Home Society of California, on the 16th day of October, 1918, for the purpose of adoption; that said relinquishment is attached hereto and made a part hereof, and is marked Exhibit "A"; that prior to the commencement of this proceeding, a copy of said relinquishment was duly filed in the office of the State Board of Charities and Correction of the State of California, and that a certificate of said filing as aforesaid is attached hereto and made a part hereof and is marked Exhibit "B".

IV.

That said child is now in the County of Los Angeles, State of California, and continuously since the 16th day of October, 1918, has been maintained in the custody of the CHILDREN'S HOME SOCIETY OF CALIFORNIA, a Corporation organized and existing under and by virtue of the laws of the State of California, and having its principal place of business at Los Angeles, California, and embracing within its objects the placement of abandoned and neglected children in family homes for adoption, licensed and authorized so to do by the State Board of Charities and Corrections of the State of California, and receiving commitments from the Juvenile Court, in the home of your petitioners.

V.

That each of your petitioners is more than ten years older than said child.

VI.

That your petitioners desire to adopt said child and desire to adopt said child under the name of Gerardo Alfonso Angel,

WHEREAS, your petitioners pray the court to permit all persons concerned in this matter to attend and be heard and that the Court examine all persons thus appearing before it, each separately, as required by law, and if satisfied that the interests of the child will be promoted by the adoption proposed grant said petition and make an order decreeing that said child has been duly and legally adopted by your petitioners, and that said child shall hereafter bear the name of Gerardo Alfonso Angel.

His

Witness to EMILIO X ANGEL.

marks,

Geo. A. Hooper mark.

Geo. A. Hooper,

Her Attorney for Petitioners.

Elise H. Choneta X ANGEL.

Mellen.

mark.

Petitioners.

— — — 000 — — —

RELINQUISHMENT.

EXHIBIT "A".

— — — 000 — — —

STATE OF CALIFORNIA,)
)SS.
County of Los Angeles.)

County of Los Angeles.

KNOW ALL MEN BY THESE PRESENTS: That I am the mother and legal guardian of a minor child known as Alfonso Ortega, born October 3, 1918; and that because of my inability to properly provide for and bring up said child, do hereby fully, freely and forever relinquish and abandon to the CHILDREN'S HOME SOCIETY OF CALIFORNIA all my right of custody, services and earnings of said minor child, to the end that a home may be procured for him.

That I do hereby authorize and request said CHILDREN'S HOME SOCIETY to place said child in a home at its discretion and I hereby waive right to notice of any proceedings for his adoption, and consent to the same in any case approved by said society, its superintendent or president, or, if requested by the Society I hereby agree to appear and consent.

That I will not seek to know with whom, or where, the said child is placed, but entrusting his well being to said CHILDREN'S HOME SOCIETY will in no way disturb or interfere with the provision made for him.

WITNESS my hand and seal at Los Angeles, California, this 16th day of October, 1918.

Witnesses to signature:

LOUISA ORTEGO.

STATE OF CALIFORNIA,)
) SS.
 County of Los Angeles.)

On this 16th day of October, A. D., 1918, before me ELISE H MELLEN, a Notary Public in and for the said county and state, residing therein, duly commissioned and sworn, personally appeared Louisa Ortega, known to me to be the person whose name is subscribed to the within Instrument, and acknowledged to me that she executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this *Cirtificate* first above written.

(S ELISE H MELLEN,
E _____
A Notary Public in and for said County and State.
L)

BOARD OF CHARITIES AND CORRECTIONS.

EXHIBIT B.

Martin A. Meyer, President.	MAIN OFFICE,
Carrie Parsons Bryant	San Francisco
Vice President.	995 Market Street.
John R. Haynes,	
Jessica B. Peixotto	BRANCH OFFICE,
Charles A Ramm,	Los Angeles
B. H. Pendleton	508 Union League
Cornelia McKinne Stanwood,	Bldg.
Secretary.	

I HEREBY CERTIFY that there has been filed this day in the office of the State Board of Charities and Corrections of the State of California, a copy of the relinquishment of Alfonso Ortega by Louisa Ortega

(ENDORSED) NO B-74835 Dept----- IN THE
SUPERIOR COURT OF THE STATE OF CALI-
FORNIA IN AND FOR THE COUNTY OF LOS
ANGELES. IN THE MATTER OF THE ADOP-
TION OF ALFONSO ORTEGA, a Minor. PETI-
TION FOR ADOPTION. FILED JUN 17 1919,
H J LELANDE Clerk By E D Doyle Deputy. George
A Hooper, Wilcox Bldg., Attorney for Petitioner.

IN THE SUPERIOR COURT OF THE STATE
OF CALIFORNIA, IN AND FOR THE
COUNTY OF LOS ANGELES.

--- oOo ---

IN THE MATTER OF THE)	CONSENT OF
ADOPTION OF ALFONSO)	CHILDREN'S
ORTEGA,)	HOME SOCIETY
)	OF CALIFORNIA
A Minor.)	TO ADOPTION.

--- oOo ---

CHILDREN'S HOME SOCIETY OF CALIFOR-
NIA, a corporation organized and existing under and
by virtue of the laws of the State of California and
having its principal place of business at Los Angeles,
California, and embracing within its objects the place-
ment of abandoned and neglected children in family
homes for adoption, licensed and authorized so to do
by the State Board of Charities and Corrections of
the State of California and receiving commitments
from the Juvenile Court, hereby fully and freely con-

sents to the adoption of the said child Alfonso Ortega by Emilio Angel and Chonita Angel, the petitioners herein.

IN WITNESS WHEREOF said CHILDREN'S HOME SOCIETY OF CALIFORNIA has caused this consent to be executed by its Assistant Superintendent thereunto duly authorized, this 17th day of June, 1919.

CHILDREN'S HOME SOCIETY OF
CALIFORNIA

By Elise H. Mellen

Assistant Superintendent.

Executed in the Presence of
SIDNEY N REEVE

Judge of the Superior Court.

IN THE SUPERIOR COURT OF THE STATE
OF CALIFORNIA, IN AND FOR THE
COUNTY OF LOS ANGELES.

--- oOo ---

IN THE MATTER OF THE)	
ADOPTION OF ALFONSO)	AGREEMENT OF
ORTEGA,)	ADOPTION.
A Minor.)	

--- oOo ---

Emilio Angel and Chonita Angel having petitioned the above entitled Court for the approval of the adoption of Alfonso Ortega, a minor, do hereby agree with the State of California, and with the said minor

child to the effect that the said minor child shall be adopted and treated in all respects as their own issue should be treated and that said minor child shall enjoy all of the rights of a natural child of our own issue, even unto and including the right of inheritance.

IN WITNESS WHEREOF, we have hereunto set our hands this 17th day of June, 1919.

Witness to Signatures.	X EMILIO ANGEL
------------------------	-------------------

Geo A Hooper.	X
Elise H Mellen.	CHONITA ANGEL

Executed in the presence of
SIDNEY N REEVE

Judge of the Superior Court
of the State of California.

IN THE SUPERIOR COURT OF THE STATE OF
CALIFORNIA, IN AND FOR THE
COUNTY OF LOS ANGELES.

--- oOo ---

IN THE MATTER OF THE)	
ADOPTION OF ALFONSO)	CONSENT OF
ORTEGA,)	THE HUSBAND
	) TO ADOPTION.
A Minor.)	

--- oOo ---

I, Emilio Angel do hereby declare that I am the husband of Chonita Angel and that I now reside and for the 12 years last past have resided with my said

wife and that no separation has ever taken place between us; that I know the said minor child Alfonso Ortega; that I hereby give my full and free consent to the adoption of the said child by my said wife; and that I hereby give my full and free consent to the adoption of the said child jointly by myself and by my said wife.

IN WITNESS WHEREOF, I have hereunto set my hand this 17th day of June, 1919.

His
EMILIO X ANGEL

Witnesses as to mark.

mark.

Geo A Hooper

Elise H Mellen.

Executed in the presence of

SIDNEY N REEVE

Judge of the Superior Court
of the State of California.

--- oOo ---

IN THE SUPERIOR COURT OF THE STATE
OF CALIFORNIA IN AND FOR THE
COUNTY OF LOS ANGELES.

IN THE MATTER OF THE)	
ADOPTION OF ALFONSO)	CONSENT OF
ORTEGA,)	THE WIFE TO
	) ADOPTION.
A Minor.)	

--- oOo ---

I Chonita Angel, do hereby declare that I am the wife of Emilio Angel, and that I now reside and for

the 12 years last past have resided with my said husband and that no separation has ever taken place between us; that I know the said minor child, Alfonso Ortega; that I hereby give my full and free consent to the adoption of the said child by my said husband; and that I hereby give my full and free consent to the adoption of the said child jointly by myself and by my said husband.

IN WITNESS WHEREOF, I have hereunto set my hand this 17th day of June, 1919.

Witnesses as to mark.

Her
CHONITA X ANGEL

Geo A. Hooper
Elise H Mellen

mark.

Executed in the presence of
SIDNEY N REEVE

Judge of the Superior Court
of the State of California.

(ENDORSED) NO B-74835 Dept— IN THE
SUPERIOR COURT OF THE STATE OF CALI-
FORNIA, IN AND FOR THE COUNTY OF LOS
ANGELES. IN THE MATTER OF THE ADOP-
TION OF ALFONSO ORTEGA, A Minor, Consents
and Agreement for Adoption. FILED JUN 17, 1919,
H J LELANDE, Clerk By R. F. Gragg, Deputy.

IN THE SUPERIOR COURT OF THE STATE
OF CALIFORNIA, IN AND FOR THE
COUNTY OF LOS ANGELES.

--- oOo ---

IN THE MATTER OF THE)	
ADOPTION OF ALFONSO)	DECREE OF
ORTEGA,	) ADOPTION.
A Minor.)	

--- oOo ---

Emilio Angel and Chonita Ortega, having presented their petition praying for approval of their adoption of Alfonso Ortega, a minor, and the said matter coming on regularly to be heard, George A. Hooper, appearing as attorney for petitioners, there appearing before the Court Emilio Angel and Chonita Angel, his wife, Alfonso Ortega, the said child and Elise H. Mellen, Assistant Superintendent of the CHILDREN'S HOME SOCIETY OF CALIFORNIA, who were examined by the Court, each separately, from which examination it is found that Emilio Angel is of the age of 32 years; that Chonita Angel is of the age of 30 years; that they are residents and each of them is a resident of the County of Los Angeles State of California, that they have been united in marriage for 12 years last past and are living together as husband and wife; that on or about the 3rd day of October, , 1918, the said Alfonso Ortega was born to Randolph Ortega and Louisa Ortega husband and wife. That said Randolph Ortega, father of said minor child, is deceased.

That Louisa Ortega, mother of said minor child, by an instrument in writing, duly acknowledged as required by law, relinquished and abandoned said minor child to the Children's Home Society of California on the 16th day of October, 1918. for the purpose of adoption; that a copy of said relinquishment was duly filed in the office of the State Board of Charities and Correction of the State of California, prior to the commencement of this proceeding.

That said child is now in the County of Los Angeles, State of California, and continuously since the 16th day of October, 1918, has been maintained in the custody of the CHILDREN'S HOME SOCIETY OF CALIFORNIA, a Corporation, organized and existing under and by virtue of the laws of the State of California and having its principal place of business at Los Angeles, California, and embracing within its objects the placement of abandoned and neglected children in family homes for adoption, licensed and authorized so to do by permit of the State Board of Charities and Corrections of the said State of California, and receiving commitments from the Juvenile Court, in the home of the petitioners herein; that each of the petitioners is more than ten years older than the said child that the said petitioners desire to adopt, the said child and desire to adopt him under the name of Gerardo Alfonso Angel.

And the said petitioners, Emilio Angel and Chonita Angel and the managers of the Children's Home Society of California having executed, in the presence

of the Court, the requisite consent and all the persons appearing before the court having been examined, each separately, as required by law, and it appearing therefrom that the said petitioners are able to provide and care for said child in such a manner that its interests will be promoted by the adoption proposed, and the said petitioners having then and there in the presence of the Court executed an agreement to the effect that the said child shall be adopted and treated in all respects as their own issue should be treated, and the Court, after hearing the evidence, being satisfied that the interests of the said child will be promoted by the adoption proposed, grants said petition, and it is, therefore, by the Court,

ORDERED, ADJUDGED AND DECREED, that the said Alfonso Ortega shall henceforth and hereafter be regarded and treated in all respects the child of Emilio Angel and Chonita Angel, and that the said child shall henceforth and hereafter bear the name of Gerardo Alfonso Angel.

DONE IN OPEN COURT this 17th day of June, 1919.

SIDNEY N. REEVE.

Judge of the Superior Court.

- - - - -
 (ENDORSED) NO B-74835 Dept — IN THE
 SUPERIOR COURT OF THE STATE OF CALI-
 FORNIA, IN AND FOR THE COUNTY OF LOS
 ANGELES. In the Matter of the Adoption of Alfonso

Ortega, a Minor. DECREE OF ADOPTION.
 DOCKETED JUN 23 1919. ENTERED JUN 23
 1919. BOOK 472 Page 300 BY Teresa Hogan
 Deputy Clerk FILED JUN 17 1919 H J LELANDE
 Clerk By E D Doyle Deputy.

IN THE SUPERIOR COURT OF THE STATE
 OF CALIFORNIA, IN AND FOR THE
 COUNTY OF LOS ANGELES.

--- oOo ---

IN RE ADOP. OF)
)
Plaintiff)
)
vs.	) SS.
)
ALFONSO ORTEGA, a Minor,)
)
Defendant.)

--- oOo ---

I, H. J. LELANDE, County Clerk of the County
 of Los Angeles, State of California, and *ex-officio*
 Clerk of the Superior Court in and for said County,
 do hereby certify the foregoing to be a true copy of
 the Judgment entered in the above entitled action, and
 recorded in Judgment Book 472 of said Court, at page
 300.

And I further certify that the foregoing papers,
 hereto annexed constitute the Judgment Roll in said
 action.

WITNESS my hand and the seal of said Superior Court this JUN 23 1919.

H J LELANDE, Clerk

(S

E

A

L)

By W. B. Hitchcock, Deputy.

STATE OF CALIFORNIA:
LOS ANGELES COUNTY :

Louisa Cabrillos being first duly sworn deposes and says that she is the Petitioner in the foregoing Petition for a Writ of Habeas Corpus, that she has heard read and knows the contents of the foregoing petition, and the statements therein contained are true of her own knowledge, except as to the matters and things therein stated on her information and belief, and as to those matters and things she believes it to be true.

Louisa Cabrillos

Subscribed and sworn to before me this
19 day of April, 1921.

F C Austin

(Seal) Notary Public in and for Los Angeles
County, California.

(Endorsed) 2996 Crim. ORIGINAL In Re Habeas Corpus Alfonso Cabrillos an infant Filed May 2-1921 Chas. N. Williams, Clerk Douglas Van Dyke Deputy F. C. Austin & R. C. Noleman Attorneys for Petitioner 308-9 Bullard B Phone 15497.

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA,
(Southern Division)

In re)	
ALFONSO CABRILLOS,)	ORDER FOR WRIT
alias etc.)	HABEAS CORPUS.
An Infant.)	No. 2996 Crim.
)	<hr/>
)	

The Court being informed in the premises, directs that on the filing of the Petition, that the Writ issue, directed to the Respondent, made returnable on the 9th day of May, 1921, at ten o'clock A. M.; that the Marshal in and for this District on payment of the costs therefor take into his Custody the infant child Alfonso Cabrillos, also known as Alfonso Ortega and as Gerardo Alfonso Angel and safely keep and have in his custody and before the court on the day above then and there to do with the said infant child as may be directed by order of the Court.

Done this 2nd day of May, 1921.

Trippet
Judge.

(Endorsed) Original. Crim. No. 2996 In the District Court of the United States, Southern District of California (Southern Division) In re ALFONSO CABRILLOS, also known as ALFONSO ORTEGA and as GERARDO ALFONSO ANGEL, an infant, ORDER FOR WRIT OF HABEAS CORPUS. Filed

May 2- 1921 *Chas. N. Williams, Clerk* Douglas Van Dyke, *Deputy* F. C. Austin and R. C. Noleman, 309 Bullard Block, Phone 15497.

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA,
(Southern Division)

IN-RE:)	No. 2996 Crim.
ALFONSO CABRILLOS,)	WRIT OF HABEAS
alias etc.,)	CORPUS
An Infant.)	

THE PRESIDENT OF THE UNITED STATES
OF AMERICA TO EMILIO ANGEL and
CHONITA ANGEL

GREETING:

YOU are hereby commanded to have the body of ALFONSO CABRILLOS, also known as ALFONSO ORTEGA and also known as GERARDO ALFONSO ANGEL, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, before the United States District Court for the SOUTHERN DISTRICT (Southern Division) OF CALIFORNIA, at Los Angeles, California at 10 o'clock A. M., on the 9th day of May, A. D. 1921, to be dealt with according to law; and have you then and there this writ, with a return thereon of your doings in the premises.

WITNESS the Honorable Oscar A. Trippet, Judge of the United States District Court for the Southern

District of California, this 3rd day of May, A. D. 1921, and of the independence of the said United States the 145th.

CHAS. N. WILLIAMS

Clerk.

(Seal)

By Douglas Van Dyke, Deputy

(Endorsed) Marshal's Criminal Docket No. 11511
No 2996 Crim. S. D. United States District Court
Southern District of California Southern Division. In
re - - ALFONSO CABRILLOS, alias etc. An Infant.
WRIT OF HABEAS CORPUS. Filed May 7 1921
CHAS. N. WILLIAMS, Clerk R S Zimmerman
Deputy Clerk.

In obedience to the within writ of Habeas Corpus,
I served Emelio Angel and Chonita Angel personally
by leaving copy with Emelio Angel and Chonita Angel,
and I also took into my custody Alfonso Cabrillos on
the 3d day of May, 1921, and released him upon order
of U. S. District Judge Trippet.

C. T. WALTON, U. S. Marshal,

By D. S. Bassett,

Deputy

Dated May 3d, 1921.

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION.

In Re ALFONSO CABRILLOS, :
Also Known as ALFONSO OR- : Answer & Return
TEGO, etc., : on Habeas Corpus.
an Infant :

Respondents Emilio Angel and Chonita Angel as
an answer and return to the within writ of Habeas
Corpus, respectfully represent and allege:

That the said child, Alfonso Ortego, now known as
Gerardo Alfonso Angel, is in the custody and under
the control of respondents. That said child is law-
fully and justly in their custody and under their
control.

That the said child is in the custody and under the
control of respondents pursuant to a decree of the
Superior Court of the State of California, which said
decree is in full force and effect, a copy of which is
attached hereto and made a part hereof. *The* the
said Superior Court of the State of California is a
court having full jurisdiction in the premises and hav-
ing full jurisdiction to render said decree.

That the said decree was a decree of adoption, and
that the petitioner herein, the mother of said child,
consented to said adoption and relinquished her right
to the custody of said child. That the said child was
relinquished to the Children's Home Society of Cali-

fornia, a corporation, organized for the purpose of placing in homes children who have been deserted and given up by their parents, and under the supervision of the State Board of Charities and Correction of the State of California. That the said Children's Home Society of California consented to said adoption.

That said child is not being unlawfully detained, restrained, imprisoned or deprived of his liberty, by respondents or by anyone.

The respondents deny that they are temporary sojourning within the confines of the United States of America, but allege that they are residents therein and have been residents therein for more than six years.

The respondents deny that by sham, subterfuge, fiction, inadvertance, unlawful or unwarranted proceedings, or at all or in any manner, the said child has been or is now being deprived of his right to citizenship or of his rights of citizenship, or is being expatriated or deprived of his liberty.

The respondents have no information or belief as to the allegation that the said mother of said child signed the relinquishment of said child without understanding, and therefore deny that such agreement was not made understandingly, and deny that she was not physically or mentally capable of understanding such agreement.

Respondents deny that the petitioner herein is the lawful custodian of said child. They deny that said

child has lost any rights or privileges as a citizen of the United States.

They deny that said child, by reason of being adopted as herein stated, or at all, or for any reason, was or has been expatriated or divested of all or any of his rights of citizenship of the United States, and deny that the United States is being or has been deprived of one of its citizens, and deny that said child has been or is being deprived of his right to participate in public affairs, political affairs, public activities, the right of suffrage or the inherent rights conferred upon citizens of the United States.

They deny that the said adoption works an expatriation of a native born citizen.

They deny that by said adoption the laws of the United States are or have been violated or public policy disregarded.

They deny that the court that made said decree is or was wholly or at all without jurisdiction. They deny that said decree of adoption was or is fiction, sham, unlawful, unwarranted or void in any manner.

Respondents deny that they are about to, or were about to take said child to the Republic of Mexico.

Respondents have no information or belief upon the subject and therefore deny that the sections of the Civil Code of California relating to adoptions and quoted in the petition herein, are or that any of them are contrary to the constitution of the United States, and deny that they or any of them are in violation of

all or any rules or regulations relative to citizens or citizenship. They deny that said sections work an expatriation, or that any of said sections work an expatriation of said child or are in derogation of common, constitutional or statutory law.

Respondents deny that said sections of the Civil Code of California are contrary to the fourteenth amendment to the constitution of the United States, or to the fifteenth amendment or to any amendment.

They deny that they are without respect for this court or for the laws of the state or of the United States, and deny that they have threatened to go to the Republic of Mexico in case proceedings are taken regarding said child.

Respondents for further answer hereto, alleges and claim that this court is without jurisdiction to hear or determine this matter, and respectfully ask that the writ be dismissed. That said petition does not state sufficient facts for the issuance of this writ.

his
Emilio X Angel
mark

her
Chonita X Angel
mark

Geo A Hooper

Attorney for Respondents

(See Petition for Decree of Adoption)

STATE OF CALIFORNIA

SS

COUNTY OF LOS ANGELES

EMILIO ANGEL AND CHONITA ANGEL being duly sworn depose and say that they are the respondents herein and have heard read the within and foregoing return and answer, and know the contents thereof and that the same is true of their own knowledge, except as to matters stated upon information and belief and as to those matters they believe them to be true

Subscribed and sworn to before me his
this 6th day of May, 1921 Emilio X Angel
mark

her

Lloyd O. Miller, Chonita X Angel
Notary Public, Los Angeles County, mark
State of California.

(Seal)

Witness as to marks

Geo A. Hooper

(Endorsed) 2996 Crim. IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA (Southern Division) In Re Alfonso Cabrillos etc., an Infant. on Habeas Corpus Return and Answer Received copy of within return this 6th day of May 1921 F C Austin R C Noleman Atty for Petitioner Filed May 7 1921 Chas. N. Williams Clerk By Louis J Somers Deputy George A. Hooper,

Attorney for Respondents 401 California Bldg., Los Angeles, Calif.

At a stated term, towit: the Jan 1921, Term of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday the 23rd day of May, in the year of our Lord One thousand nine hundred and twenty one

Present:

The Honorable OSCAR A. TRIPPET, District Judge.

In the Matter of Alfonso Cabrillos, et al.,)
 etc., for a Writ of Habeas Corpus.) No. 2996
) Crim. S. D.

This matter coming on for opinion of Court on Petition for Writ of Habeas Corpus, and the Court having announced that the Court's Opinion is ready, and ordered that the same be filed herein, and it appearing from said Opinion that the Petition for Writ of Habeas Corpus has been by the Court denied, and accordingly, said Petition for Writ of Habeas Corpus is dismissed, to which ruling of the Court, R. C. Noleman thereupon enters an Exception herein on behalf of the Petitioner, which is ordered entered herein.

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT, SOUTHERN DIVISION,
STATE OF CALIFORNIA.

IN-RE: ALFONSO CABRIL-) No. 2996 (crim.)
LOS, ALSO KNOWN AS) CHARGE THAT
ALFONSO ORTEGA AND) SAID INFANT
AS GERARDO ALFONSO) CHILD IS UN-
ANGEL, an infant;) LAWFULLY
LOUISA CABRILLOS, Peti-) DETAINED BY
tioner.) EMILLO AN-
HABEAS CORPUS) GEL & CHO-
<hr/>) NITA ANGEL,
) his wife.
) Respondents.

PETITION FOR APPEAL

And now comes Louisa Cabrillos, Petitioner and respectfully represents that on the 23rd day of May, 1921, a judgment was entered by this Court dismissing her petition for habeas corpus of the infant child Alfonso Cabrillos, also known as Alfonso Ortega and as Gerardo Alfonso Angel, and remanding said child in custody of Emillio Angel and Chonita Angel, Respondents:

And your petitioner respectfully shows that in said record, proceedings and judgment in this cause lately pending against your Petitioner and in behalf of the said child aforesaid, manifest errors have intervened to the prejudice and injury of your Petition in behalf of said child, all of which will appear more in detail

in the assignment of error which is filed with this petition.

Wherefore, your petitioner prays that an appeal may be allowed her from said judgment to the United States Circuit Court of Appeals for the 9th Circuit.

Louisa Cabrillos

Petitioner by her attorneys,

F C Austin &

R C Noleman

(Endorsed) HABEAS CORPUS No. 2996 (Crim.)
In the United States District Court Southern District of California Southern Division IN-RE: Alfonso Cabrillos et aliases, an infant, Louisa Cabrillos, Petitioner, Appellant *vs.* Emillios Angel et ux, Respondents, Appellee' PETITION FOR APPEAL
Filed Jun 13 1921 CHAS. N. WILLIAMS, *Clerk*
Douglas Van Dyke *Deputy* F. C. Austin & R. C. Noleman 307-8-9 Bullard Blk., Phone 15497, Attorneys for Petitioner, Appellant.

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT, SOUTHERN DIVISION,
STATE OF CALIFORNIA.

	)	HABEAS COR-
	)	PUS No. 2996
	)	(Crim.)
IN-RE: ALFONSO CABRIL-	)	CHARGE THAT
LOS, ALSO KNOWN AS	)	SAID INFANT
ALFONSO ORTEGA AND	)	CHILD IS UN-
AS GERADO ALFONSO	)	LAWFULLY
ANGEL, an infant;	)	DETAINED BY
LOUISA CABRILLOS,	)	EMILLIO AN-
PETITIONER AND APPEL-	)	GEL & CHO-
LANT.	)	NITA ANGEL,
	)	his wife,
	)	RESPONDENTS
	)	AND APPEL-
	)	LEE'S

ORDER ALLOWING APPEAL

On reading of the petition of Louisa Cabrillos, Petitioner, for appeal and consideration of the assignment of error presented therewith it is ordered that the appeal as prayed for be and is hereby allowed.

Cost bond on appeal is hereby fixed in the sum of \$300.00

Dated June 1921.

Trippet

Judge.

(Endorsed) HABEAS CORPUS No. 2996
(Crim.) In the United States District Court South-
ern District of California Southern Division IN-
RE: Alfonso Cabrillos et aliases, an infant, Louisa

Cabrillos, Petitioner, Appellant, *vs.* Emillio Angel et ux, Respondents, Appellee' ORDER ALLOWING APPEAL IN HABEAS CORPUS. Filed Jun 14 1921 *Chas. N. Williams, Clerk* Douglas Van Dyke, Deputy F. C. Austin & R. C. Noleman 307-8-9 Bul-lard Blk., Phone 15497, Attorneys for Petitioner, Appellant.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT, SOUTHERN DIVISION, STATE OF CALIFORNIA.

	:	HABEAS
	:	
IN-RE: ALFONSO CABRIL-	:	CORPUS
LOS, ALOSO KNOWN AS	:	
ALFONSO ORTEGA AND	:	No. 2996 (Crim.)
AS GERADO ALFONSO	:	Charge that said
ANGEL, and infnat LOUISA	:	Infant Child is un-
CABRILLOS,	:	lawfully detained
Petitioner.	:	by Emillio Angel
	:	and Chonita Angel,
	:	his wife,
	:	Respondents.

ASSIGNMENT ERRORS—HABEAS CORPUS

And now comes LOUISA CABRILLOS, Petitioner on behalf of the infant child, Alfonso Cabrillos, also known as Alfonso Ortega and as Gerado Alfonso Angel, by F. C. Austin and R. C. Noleman, her attorneys, and in connection with her petition for an appeal, says that in the record and proceedings, and judgment aforesaid, and during the trial

of the above entitled cause in said District Court, error has intervened to her prejudice, and this Petitioner, Appellant, here assigns the following errors, to-wit:

1

The Court erred in not holding that the infant child, Alfonso Cabrillos, by whatever name he may be designated, is wrongfully held and *illegaly* and unlawfully detained by the Respondents, Emillio Angel and his wife Chonita Angel.

2

The Court erred in not holding that said child is detained by the Respondents without due process of law.

3

The Court erred in not holding that the Petition, Appellant herein is deprived of the custody of said infant child without due process of law.

4

The Court erred in not finding that Sections 221, 222, 227, 228 and 229 of the Civil Code of the State of California, as were each *specifically* pleaded and embodied in the Complaint and Petition of the Petitioner, are contrary to Fourteenth Amendment to the Constitution of the United States, and contrary to the Fifteenth Amendment to the Constitution of the United States, and contrary to the Bill of Rights as enacted by *Congess* of the United States.

5

The Court erred in not holding that a Citizen of the United States being an infant of immature age, can not be adopted by an Alien.

6

The Court erred in not holding that a law enacted by any State of the Union perm~~tt~~ing an Alien to adopt an infant citizen of the United States is contrary to the Constitution of the United States.

7

The Court erred in holding that said minor child was not expatriated by being adopted by an Alien.

8

The Court erred in holding that said infant child was not deprived of any of its rights as an American Citizen by being adopted by an Alien.

9

The court erred in dismissing the petition for habeas corpus and remanding the said infant child to the custody of the Respondents, Emillio Angel and Chonita Angel:

10

The Court erred in holding that Emillio Angel and Chonita Angel had acquired a right to the custody of said infant child by reason of the adoption proceedings had in the Court of the State of California.

By reason whereof, this petitioner and appellant, prays that said judgment may be reversed and that said infant child be given to the custody of Petitioner, Appellant.

F. C. Austin & R. C. Noleman

Attorneys for Petitioner and Appellant.

(Endorsed) HABEAS CORPUS No. 2996
(Crim.) In the United States District Court South-

ern District of California Southern Division IN-RE:
 Alfonso Cabrillos et aliases, an infant, Louisa Cabrillos,
 Petitioner, Appellant. *vs.* Emillios Angel et ux,
 Respondent, Appellee' ASSIGNMENT OF ERRORS
 Filed Jun 13 1921 CHAS. N. WILLIAMS, Clerk
 Douglas Van Dyke Deputy F. C. Austin and R. C.
 Noleman 307-308-309 Bullard Blk., Phone 15497, At-
 torneys for Petitioner, Appellants.

IN THE DISTRICT COURT OF THE UNITED
 STATES FOR THE SOUTHERN
 DISTRICT OF CALIFORNIA
 (Southern Division),

In-Re; Habeas Corpus,)	
ALFONSO CABRILLOS,	)	Habeas Corpus
alias etc.,	)	No. 2996 (Crim.)
An Infant.)	
)	

BILL OF EXCEPTIONS

BE IT REMEMBERED, that the above cause came on for hearing on the 9th day of May, 1921, at which time evidence was offered and received, and said cause was thereafter adjourned to May 16th, 1921, for argument and thereafter adjourned to May 23rd, 1921, for decision of the Court, each of said days being days of the January A. D. 1921, Term of said Court, before Hon. Oscar A. Trippet Judge Presiding.

Messers. F. C. Austin and R. C. Noleman appeared as Attorneys for Petitioner; George A. Hooper Esq., appeared as Attorney for the Respondents:

(Testimony of J. Cabrillos.)

The Petitioner to maintain her case offered the following evidence:

“Mr. Noleman: We will call Mr. Cabrillos,

J. CABRILLOS being called as a witness on behalf of petitioner, having been first duly sworn testifies as follows:

BY Mr. NOLEMAN:

Q. What is your name?

A. J. Cabirillos.

Q. Mr. Cabrillos where were you born?

THE COURT; Do not they admit that he is an alien?

Mr. NOLEMAN: This is the father of the girl, father of the woman who is the mother of the child.

THE COURT: They admit that he is a citizen of the United States and that the petitioner is a citizen of the United States. So what is the use of proving it?

Mr. NOLEMAN: It is not necessary. I will now offer to prove by Mr. Cabrillos that on the 16th day of October, 1918, when this child was left at this home, it was left there because of the fact that the mother was sick and the child was sick; that he was to return for the child in a few weeks; that he did come back about the last of November in 1918; and that the Children's Society put him off in some way and then wrote him that the child foster parents and then afterwards refused to let him know where the child was. I want to make this a part of the record and if your Honor finds it is not important, that will dispose of

|(Testimony of J. Cabrillos.)

this witness. I also want to show that the father after a time employed a detective.

THE COURT; I don't care anything about that.

Mr. NOLEMAN: That he visited the respondent in this case and made him various offers. He offered to deposit a certain sum of money in the bank for the benefit of this child, and this respondent refused to accept it because he said the money would do him no good as he wanted to return to Mexico.

THE COURT: That is the proposition, what this man said about going to Mexico.

BY Mr. NOLEMAN: All right. Mr. Cabrillos did you on or about the 27th day of November 1919, at Los Angeles California, and in the presence of Mr. Botello and some others have a conversation with the respondent Emilio Angel relative to this child:

A. Yes,

Q. Now, did you at that time make any offer to him relative to paying him for the child or advancing money for the use and benefit of the child?

Mr. HOOPER: Objected to on the ground that it is leading; let him state what the conversation was. Objected to on the further ground that no foundation has been laid-- I want to know about this; and on the further ground that he is not a party to this action: He is not the parent of the child.

THE COURT: Objection overruled, ask the question again please.

Mr. NOLEMAN: What conversation did you have

(Testimony of J. Cabrillos.)

with the respondent Emilio Angel relative to your paying for the child or advancing money?

Mr. HOOPER; Objected to on the ground that no foundation has been laid; that the question is leading.

THE COURT: I will overrule the objection, let him state the conversation, and get through with it.

Mr. NOLEMAN; Tell the court as near as you can what occurred at that time?

A. I talked to Mr. Angel. When we went to the house, I asked him if I could help him with some money or something like that, for the benefit of the boy: and he said No, No, I needn't. Well, I said, all right then, I want to know if I can come and visit the boy. And he said, "No," Then I said, Well I think what I can do, I will go to deposit a little money for the benefit of the child's education—put in the bank some little money. Then he said, "that money won't be any benefit to me because I got to go to Mexico; I got to move from this country" That is all I can think of just now.

Mr. NOLEMAN: I do not care to inquire further.

CROSS-EXAMINATION

BY Mr. HOOPER;

Q. That was in November, 1919, Mr. Cabrillos?

A. Yes, in November, 1919, I think it was.

Q. He has not moved out of the country has he?

Mr. NOLEMAN: Objected to as incompetent, ir-

(Testimony of J. Cabrillos.)

relevant and immaterial calling for a conclusion of the witness.

THE COURT: Objection overruled.

A. I do not know.

Mr. NOLEMAN; That is all.

Mr. BOTLLO

being called as a witness on behalf of petitioner, having been first duly sworn, testifies as follows.

BY Mr. NOLEMAN:

Q. Your name is?

A. Thomas Botello.

Q. Mr. Botello, have you heretofore been retained by the mother and grand-father of this child to locate this child?

A. Yes.

Q. About when did you locate the child?

MR. HOOPER: Objected to as incompetent, irrelevant and immaterial, and that that is not in issue in this case.

THE COURT; Objection sustained.

BY Mr. NOLEMAN; Well, did you find the child?

MR. HOOPER: Objected to on the same ground.

THE COURT; Objection sustained.

By Mr. NOLEMAN; Are you acquainted with Emilio Angel the respondent in this case?

A. I am.

Q. Have you ever had any conversation with him relative to this child?

A. I did.

(Testimony of Mr. Botllo.)

Q. Did you have any conversation relative to his removing this child from the United States?

A. Yes.

Q. When, where and who was present?

A. The first time I met Mr. Angel was on the 24th day of November, 1919, I *approaced* him at his home 723 New High Street. I inquired then for Emeilo Angel. He denied that his name was Emelio Angel and said that Emilio Angel had lived in the premises but had moved to Alios Street, and that I would find him there. As I was leaving, he followed me out into the street and called me saying to me, What did I want with Emelio Angel; that he was Emilio Angel. I then told that I represented the Cabrillos in this matter and wanted to know if he would be willing to receive then fifty dollar per month from the time they had the child in their possession. He refused. Then I asked him if he would be willing to meet the grandfather and the mother of the child and have them deposit some money in the bank for the child's education and maintainance after he would become of age, twenty-one years; That he could himself name the amount and the bank would act as trustee for the child. He then said, whatever amount of money would be deposited for the benefit of the child would not do him any good, and I said "Why not?" He said "because on account of conditions here, the high cost of living, labor etc., I intend to return any minute to my country, Mexico. Then on the 27th day of No-

(Testimony of Mr. Botllo.)

vember, 1919, in the company of Mr. Cabrillos, the mother of the child, Louisa Cabrillos, I visited them again, with their permission. They permitted me to bring them there. And while there Mr. Cabrillos then asked Mr. Angel if he would accept a reasonable amount of money to be deposited by him, Mr. Cabrillos, in some bank for the education and maintainance of the child; When he stated again, that he was going to Mexico and that he would be liable to depart for Mexico any time.

Q. Did you at any time have any conversation relative to proceedings to be taken to recover this child, and what, if anything, did he say

A. I think it was during the last conversation that we had on the 27th day of November. I think in that interview there was something said about proceedings to get the child.

Mr. HOOPER: I object to anything he thinks. If he does not know, the conversation should not go into the record.

THE COURT: That is correct, Mr. Hooper.

Mr. NOLEMAN; Do you recall any conversation at any time with reference to any proceedings taken to recover this child? Mr. HOOPER; I object to that on the ground that it is leading and - -

THE COURT: What bearing would that have on the case? That is all admitted here. I understand it is admitted that the proceedings in the Superior Court were all regular.

(Testimony of Mr. Botllo.)

Mr. NOLEMAN; We charge that he was about to leave for Mexico, if court proceedings were commenced - - - - -.

THE COURT: I will not hear anything regarding court proceedings.

Mr. HOOPER: I am willing to admit that they threatened court proceedings, tried to buy them off and offered them money and every other thing. That settles that.

Mr. NOLEMAN: Was there any other interview in which he said that he was going to Mexico?

A. The day that the write was served by the United States Marshall Basset in my presence, he refused point blank to let us know anything

THE COURT: Did he say anything about going to Mexico?

A. He did not exactly say anything. He threatened us with what he was going to do, *comit* bodily injury on us and things of that sort.

THE COURT: That has nothing to do with the child in this case.

Mr. NOLEMAN: That is all.

CROSS-EXAMINATION

BY Mr. HOOPER:

Q. When you had the first and second conversations, did you talk in English or Spanish?

A. Spanish.

Q. Mr. Angel speaks very little English and she does not speaks any?

(Testimony of Mr. Botllo.)

A. I don't know, we spoke in Spanish.

Q. Now that was in 1919 that they said they might go to Mexico, and they have not gone yet. They are still here?

A. Yes.

Q. You found them living in the same place did you not?

A. Yes.

Mr. HOOPER: That is all

THE COURT: When will you be ready to argue this case?

(Time for argument, agreed upon)

Cause being presented on argument of attorney on May 16th, 1921, and thereafter on May 23rd, 1921, the cause came on for decision of the Court:

The Court being advised in the premises finds for the Respondents and dismisses the writ:

Counsel for Petitioner in open court excepts to the judgment of the Court and then and there, *orally* in open Court gave notice of Appeal.:

The foregoing draft of Bill of Exceptions being approved by Counsel representing the respective parties, it is hereby certified that the same is correct in every particular and is hereby settled and allowed and made a part of the record in this cause.

Done in open Court this 24 day of June, 1921.

Trippet

Judge.

The foregoing Bill of Exceptions having been submitted to the Respondents; It is stipulated and agreed between Attorneys for Petitioner, Appellant and Attorney for Respondents, Appellee's, that the foregoing draft be *sttled* and allowed: dated this 24th day of June, 1921.

F. C. Austin & R C Noleman

Attys., for Petitioner-Appellant.

Geo. A. Hooper

Atty., for Respondents-Appellee's.

(Endorsed) HABEAS CORPUS No. 2996 (Crim.)
In the United States District Court Southern District
of California Southern Division IN-RE: Alfonso
Cabrillos et aliases, an Infant, Louisa Cabrillos, Peti-
tioner, Appellant *vs.* Emillio Angel et ux, Respond-
ents, Appellee' ORIGINAL BILL OF EXCEP-
TIONS. *Received copy of within* this 21st day of
June 1921 George A Hooper Attorney for Respond-
ent Filed Jun 24 1921 CHAS. N. WILLIAMS,
Clerk Douglas Van Dyke, *Deputy* F. C. Austin &
R. C. Noleman, 307-8-9 Bullard Blk., Phone 15497,
Attorneys for Petitioner, Appellant.

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT, SOUTHERN DIVISION,
STATE OF CALIFORNIA.

	:	HABEAS
	:	CORPUS
IN-RE:	:	No. 2,996 (Crim.)
ALFONSO CABRILLOS, also	:	Charge that said
known as Alfonso Ortega and	:	infant child is un-
as Gerado Alfonso Angel, an	:	lawfully detained
Infant,	:	by Emilio Angel
LOUISA CABRILLOS, Peti-	:	and Chonita Angel,
tioner and Appellant.	:	his wife, Respond-
	:	ents and Appellee's

APPEAL BOND FOR COST.

KNOW ALL MEN BY THESE PRESENTS,
That we LOUISA CABRILLOS as principal and
J. H. BULLARD as surety, are held and firmly bound
unto EMILLIO ANGEL and CHONITA ANGEL
and to each of them in the full and just sum of
THREE HUNDRED (\$300.00) DOLLARS to be
paid to the said EMILLIO ANGEL and CHO-
NITA ANGEL, either or both of them, their ex-
ecutors, administrators or assigns; to which payment,
well and truly to be made, we bind ourselves, our heirs,
executors, and administrators, jointly and *severally*,
by these presents. Sealed with our seals and dated
this 14th day of June, in the year of our Lord one
thousand nine hundred and twenty one:

WHEREAS, lately at the January A. D. 1921,
term at the District Court of the United States

for Southern District Southern Division of California in a suit pending in said court between Louisa Cabrillos, Petitioner on behalf of Alfonso Cabrillos, also known as Alfonso Ortega and as Gerado Alfonso Angeles an infant child, and Emillio Angel and Chonita Angel, his wife, Respondents; A judgment was rendered against said Petitioner, dismissing her petition for habeas corpus on behalf of the said Alfonso Cabrillos, also known as Alfonso Ortega and as Gerado Alfonso Angel and remanding him, the said infant child to the custody of Emillio Angel and Chonita Angel, his wife and for cost, And the said Louisa Cabrillos on behalf of said infant child having obtained an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the decree in the aforesaid suit.

Now, the condition of the above obligation is such, That if the said Louisa Cabrillos, Petitioner and Appellant on behalf of said infant child shall prosecute her appeal to effect and answer all damages and costs, if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

Dated June 14", 1921.

Louisa Cabrillos (seal)

By F. C. Austin & R. C. Noleman
her attorney

J. H. Bullard (seal)

State of California)
Los Angeles County)ss

J. H. BULLARD a surety on the foregoing undertaking being duly sworn, says that he is worth the

sum specified in the said undertaking, over and above all his just debts and liabilities (exclusive of property exempt from execution) and that he is a resident within the Southern District of California and a free holder therein.

J. H. Bullard

Subscribed and sworn to before me this 14' day of June, 1921.

F. C. Austin Notary Public in and for the
(Seal) County of Los Angeles, State of California.

I, R. C. Noleman of Counsel for Petitioner, Appellant herein do hereby certify that I have carefully prepared and examined the foregoing bond, that in my opinion it is in due form and executed in such a manner as to conform to the rules, regulations and customs of proceedings on appeal in the Court of the United States; That the sureties are jointly and *severally* bound and that the bond is an obligation to the appellee's jointly and *severally* and that each of the sureties are obligated *severally* to each of the beneficiaries, as well as being joint obligated to the beneficiaries jointly;

Further that the bond is of unquestionable worth, by reason of the high financial standing of one of the bondsmen, viz. J. H. Bullard.

Certified this 14th day of June, 1921.

R. C. Noleman
307-8-9 Bullard Blk.,
Los Angeles, California.

I hereby approve the foregoing bond

Dated the 14 day of June 1921

Trippet

Judge or Clerk

(Endorsed) HABEAS CORPUS No. 2996 (Crim.)
In the United States District Court Southern District
of California Southern Division IN -RE: Alfonso
Cabrillos alias etc. an infant Louisa Cabrillos, Peti-
tioner, Appellant, *vs.* Emillio Angel et ux., Respond-
ents, Appellee's APPEAL BOND FOR COST Filed
Jun 14 1921 *CHAS. N. WILLIAMS, Clerk*
Douglas Van Dyke Deputy F. C. Austin & R. C.
Noleman, 307-8-9 Bullard Blk., Phone 15497, Attor-
neys for Petitioner, Appellant.

UNITED STATES OF AMERICA

District Court of the United States
SOUTHERN DISTRICT OF CALIFORNIA

IN-RE ALFONSO CABRIL-
LOS et alias an infant,
LOUISA CABRILLOS. Peti-
tion, Appellant,

vs.,

EMILLIO ANGEL and CHO-
NITA ANGEL his wife,

Respondents: Appellee's

CLERK'S OFFICE

HABEAS COR-
PUS No. 2996
(Crim.)

PRAECIPE

TO THE CLERK OF SAID COURT:

Sir:

Please cause to be prepared, viz copies

- 1 Petition for Writ;
- 2 Order for Writ;
- 3 Writ of Habeas Corpus and return
- 4 Decision of the court;
- 5 Petition for appeal;
- 6 Order allowing appeal;
- 7 Assignment of errors;
- 8 Bond on appeal;
9. Citation;
- 10 Praecipe;
- 11 Certify to Original Bill of Exceptions as Settled
and allowed;
- 12 Certificate of Clerk.

June 24th 1921

F. C. Austin and

R C Noleman

Attorneys for Petitioner Appellant.

(Endorsed) HABEAS CORPUS *No.* 2996 (Crim.)
U. S. District Court SOUTHERN DISTRICT OF CALI-
FORNIA IN-RE Alfonso Cabrillos et alias, an infant,
LOUISA CABRILLOS Petitioner, Appellant. *vs.*
EMILLOI Angel and CHONITA ANGEL his wife,
Respondents, Appellee's. PRAECIPE FOR *Filed Jun*
24 1921 Chas. N. Williams, Clerk Douglas Van
Dyke, Deputy.

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA,
(Southern Division)

IN-RE ALFONSO CABRIL-
LOS et alias an infant,
LOUISA CABRILLOS. Peti-
tion, Appellant,

vs.,

EMILLIO ANGEL and CHO-
NITA ANGEL his wife,

Respondents: Appellee's

I, CHAS. N. WILLIAMS, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing sixty pages, numbered from 1 to 60 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by appellant and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation, petition for a writ of habeas corpus, order for writ of habeas corpus, writ of habeas corpus and return, decision of the court, petition for appeal, order allowing appeal, assignment of errors, bill of exceptions, appeal bond for cost and praecipe.

I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this day of , in the year of our Lord One Thousand Nine Hundred and Twenty-one, and of our Independence the One Hundred and Forty-sixth.

CHAS. N. WILLIAMS,
Clerk of the District Court of the
United States of America, in and
for the Southern District of Cali-
fornia.

By

Deputy.

IN THE
United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

In re Alfonso Cabrillos ~~et~~ Alias, an
Infant; Louisa Cabrillos,

Appellant,

vs.

Emillio Angel and Chonita Angel, His
Wife,

Appellees.

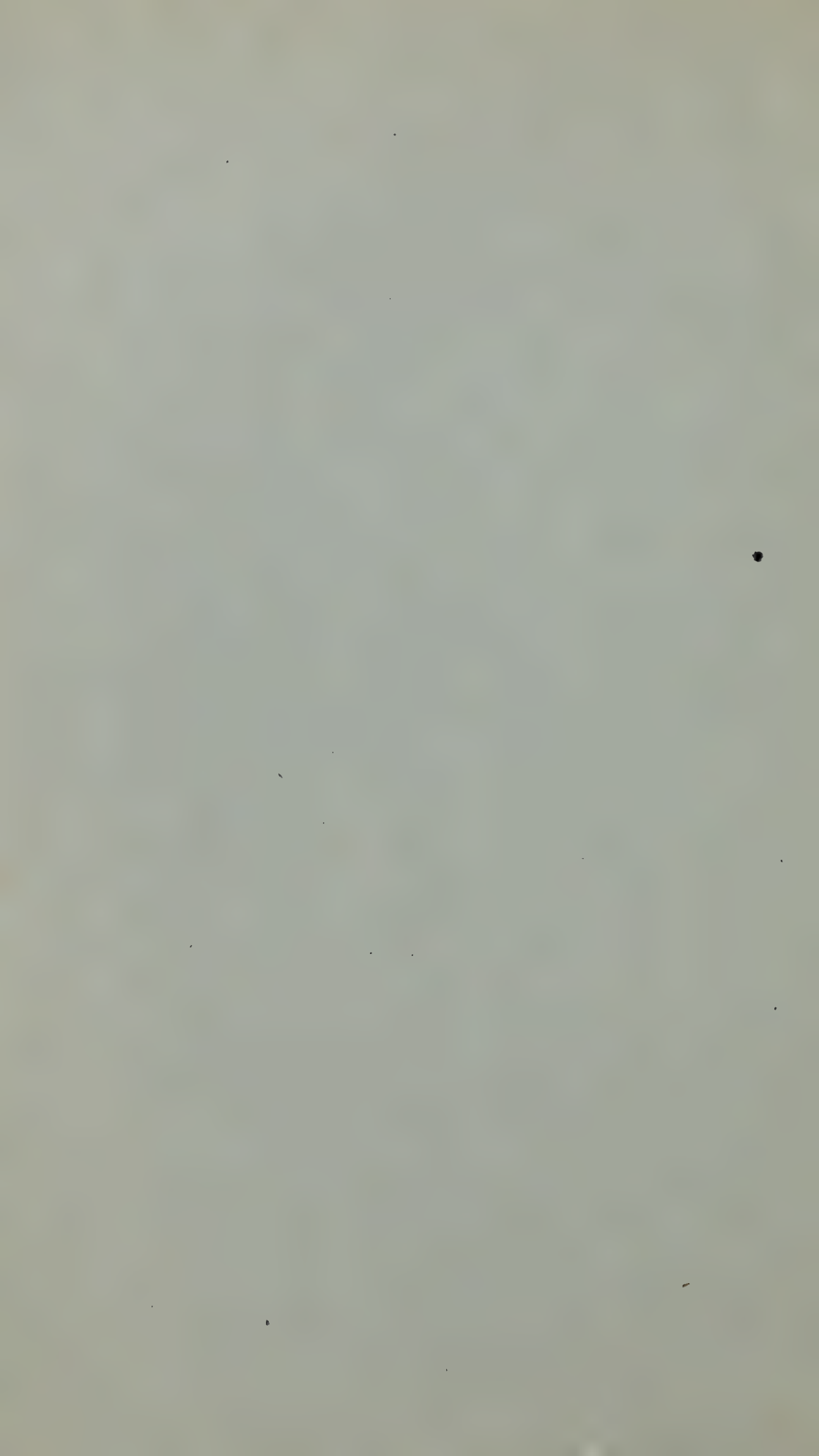
OPENING BRIEF OF APPELLANT.

F. C. AUSTIN and
R. C. NOLEMAN,
Attorneys for Petitioner-Appellant.

FILED

NOV 17 1911

P. D. MONTGOMERY



No. 3725.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

In re Alfonso Cabrillos ~~At~~ Alias, an
Infant; Louisa Cabrillos,

Appellant,

vs.

Emillio Angel and Chonita Angel, His
Wife,

Appellees.

OPENING BRIEF OF APPELLANT.

May It Please Your Honors:

The proposition presented is simple in form and not in the least difficult to state, viz.:

Can a citizen of the United States of immature age, through the medium of the laws of a state of the Union, be adopted by an alien, sojourning within the confines of such state?

The subject of this controversy is a born Subject of the United States of immature age. [Tr. 3-5.]

The respondents are aliens [Tr. 3-5] temporarily within the United States. [Tr. 49-51.]

It is admitted that the infant was adopted by the respondents in conformity to the law of California, viz., sections 221, 222, 227, 228 and 229 C. C., which sections are set out *in haec verba* in the petition for the writ. [Tr. 8-9.]

It is contended that the law of California creates a power when exercised is derogatory to the Constitution of the United States, more especially in violation of the XIV and XV amendments, and in violation of the law existing prior to such amendments; that such power when exercised does violence to the bill of rights and is shocking to the powers and duties of a SOVEREIGN NATION to its citizens.

The interpretation given by a state court is accepted by the Federal court and its validity is tested accordingly.

Olson v. Smith, 195 U. S. 341;

Mackenzie v. Hare, 165 Cal. 776.

The court of last resort of California has repeatedly declared as to the effect of a decree of adoption, interpreting the code sections, *supra*:

“By adoption proceedings, however, the status of the child was wholly changed; it became *ipso facto* the child of another and ceased to sustain that relation in a legal sense to its natural parents.”

Young v. Young, 106 Cal. 379.

“Once we have reached that conclusion that the effect of an adoption under the code is to sub-

stitute the adopted parent for the parent by blood, we must give to that conclusion its logical result. FROM THE TIME OF THE ADOPTION, the adopting parent is, so far as concerns all legal rights and duties flowing from the relation of parent and child, the PARENT of the adopted child; FROM THE SAME MOMENT the parent by BLOOD ceases, in a legal sense, the parent—HIS PLACE has been taken by the ADOPTING PARENT.”

Estate of Johnson, 164 Cal. 317.

“The effect of adoption was to establish the legal relation of parent and child, with ALL OF THE INCIDENTS and CONSEQUENCES.”

Estate of Ballou, 181 Cal. 64, citing many former adjudicated cases.

“Upon the adoption of minors, they not only become members of the family of the adopted parents, but cease to be of the family of the natural parents.”

Estate of Pillsbury, 58 Cal. Dec., 166 Pac. 11.

“After such adoption the residence of the child was that of those who adopted him.”

Estate of Taylor, 131 Cal. 180.

“RIGHT OF HUSBAND, AS HEAD OF FAMILY. The husband is the head of the family. He may choose any reasonable place or mode of living.
* * *

Sec. 156, C. C. California.

“Right of parent to determine residence of child. A parent entitled to the custody of a child has a right to change his residence. * * *”

Sec. 213, C. C. California.

REMEDY.

“If the Juvenile Court proceedings are void and the child illegally detained from its parents, its possession may be obtained by *habeas corpus* proceedings.”

In re Cozza, 163 Cal. 516.

NO ESTOPPEL.

The natural parents cannot be estopped by acquiescence in the claim of the adopting parents for several years and they may assert their right for the custody of the child—as in this case by *habeas corpus*.

Ex parte Clark, 87 Cal. 638.

Section 222, Civil Code of California, viz.:

“WHO MAY ADOPT. The person adopting must be at least ten years older than the person adopted.”

Was it not intended and should it not be read into this section, THE PERSON ADOPTING MUST BE A CITIZEN OF THE UNITED STATES?

Can a court acquire jurisdiction in an adoption proceeding without an averment in the declaration to the effect that the PERSON OR PERSONS seeking to adopt are citizens of the United States?

Under the law of California, a white child can be adopted by a colored family, a Chinaman or Jap might adopt a free-born American, white, citizen minor; the unspeakable Turk could adopt the fair, free-born, female American citizen child.

“Regardless of whatever reason may be given or the power invoked to sustain the act of a state, if the act is one which TRENCHES directly upon that which is exclusive within the jurisdiction of the national Government, IT CAN NOT BE SUSTAINED.”

Brennan v. Titusville, 153 U. S. 299.

In the language of CHIEF JUSTICE TANNEY:

“That for all great purposes for which the GOVERNMENT was established, we are one people, one common country. We are all CITIZENS OF THE UNITED STATES.”

For this reason the court decided the cause of Crandall v. Nevada, 73 U. S. (6 Wall. 36).

If a state seek to abridge the rights of a citizen such claim is contrary to the Constitution of the United States. The existence of such a power in the state is therefore inconsistent with the objects for which the Federal Government was established. An exercise of such power is accordingly void.

Crandall v. Nevada, *supra*, citing therein Brown v. Maryland and McColough v. Maryland.

“By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders

judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society.

“Everything which may pass under the form of enactment is not, therefore, to be considered the law of the land.”

(Webster in) *Dartmouth College v. Woodward*,
4 Wheaton 579.

“Personal liberty consists of the power of locomotion, of changing situation, or moving one’s person to whatsoever place one’s own inclination may direct without imprisonment or restraint, unless by due process of law.”

1 Blackstone Com. 134.

A citizen of the United States in restraint of his liberty or locomotion may be delivered therefrom by *habeas corpus* in the proper Federal court.

In re Yung Sing Hee, 36 Fed. 437;

Ex parte Chin King, 35 Fed. 354.

The duty of the state to protect all of its citizens in the enjoyment of equal rights was original by the state and it still remains there. The obligation by the Fourteenth Amendment resting upon the United States is to see that the state do not deny this right. This amendment guarantees no more.

LeGrand v. U. S., 12 Fed. 145.

The Fourteenth Amendment embraces every line of cases where there may be a wrong.

San Mateo County v. S. P. Ry., 13 Fed. 145.

The Federal court, speaking with reference to the Civil Rights Bill, says of this act:

“This section throws wide open the doors of the Federal court, as the altar of justice—the place of refuge.”

Tuchman v. Welsh, 42 Fed. 548.

Fourteenth Amendment: “Nor shall any state deprive any citizen of life, liberty or property without due process of law.” This reference “goes against any part of the legal machinery of the state as well as the whole of it.”

In re Monroe, 46 Fed. 52.

An American woman married to a foreigner is a striking example of losing citizenship.

The act of March 2, 1907 (34 U. S. Stats. 1228) is declaratory as to the woman thus marrying at once assumes the status of her husband.

A woman who thus marries in the state of California loses her right to suffrage.

Mackenzie v. Hare, 165 Cal. 776.

It also lays down the doctrine that it is immaterial whether the alien is permanently located in that state and continues to reside therein, nevertheless the woman forfeits her right of franchise.

This decision also recognizes all that has been hereinbefore said as to the control exercised by the Constitution of the United States and the doctrine laid down by Federal courts.

The common law did not recognize the adoption of children. Our law seems to follow the Roman law. (Morse Cit. Sec. 40, *id.* 75.) The adopted takes the nationality of the adopting father. (*Id.* 22.) It was the indelible law of Rome, when citizenship was once acquired, the people could deprive such citizen of property, liberty, life, but NEVER OF CITIZENSHIP, without his consent. (*Id.* 104.)

Every nation has its nature and principles and its decay begins with the destruction of its principles. (*Id.* 185.)

Married women assume the status of their husbands—so do the children; husband has the right to change the domicile; so does the guardian as to his ward. (*Id.* 106.) Citing Parson on Citizenship 645.

Inhabitants are distinguished from citizens. Foreigners are permitted to establish their residence. Bound by their abode in the country to society, they are subject to the laws of the state while they remain in it, although they do not participate in all the rights of citizens.

Wheaton Int. Law 872;

Morse Cit. 27.

The national character of an individual is determined by its birth or ties of parentage—and this constitutes the nationality of citizens; or by naturalization in another country, which creates nationality by acquisition.

Morse Cit. 26.

Ties of parentage by the decree of adoption, as in the case at bar, have been created by the decree of adoption.

Citizens enjoy civil rights and all the privileges; inhabitants enjoy civil rights only; citizenship in its narrowest sense confers imprescriptive right to SPEAK FOR THE COMMUNITY, TO ACT AS ITS AUTHORITATIVE EXPONENT.

Morse Cit. 6.

ARISTOTLE defines a citizen to be one who is a partner in the LEGISLATIVE and JUDICIAL POWER, one who shares in the HONORS OF STATE; while he who has no part is a sojourner.

LORD PALMERSON says:

No government, for example, will allow one of its subjects living in a foreign country to be brought under the law for levying of conscription there, and be compelled to serve in the army of the foreign state.

It is the consent of the individual, not of the country of which he is a native, * * * that works a change of nationality.

Morse Cit. Sec. 32.

The right of a citizen to expatriate himself is recognized by the second section of the act of March 2, 1907; the exception being:

“And provided also, that no American citizen shall be allowed to expatriate himself when this country is at war.”

Yet by this record [Tr. 28], on June 21st, 1919, at a time when this nation was at war, the state of California saw fit to, and did, cause one of its native-born male citizens to be adopted by an alien. !

Fealty and defense of state are demanded of citizens.

It is the duty of the state to protect its citizens.

Is this not the time, the place and the duty of the court to intervene and protect one of its citizens, who on account of immature age is unable to protect himself?

What are the duties of the United States toward this infant of less than three years of age?

Respectfully submitted,

F. C. AUSTIN and

R. C. NOLEMAN,

Attorneys for Petitioner-Appellant.

United States
Circuit Court of Appeals
For the Ninth Circuit.

PETER B. HOVLEY,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Southern District of California,
Southern Division.

FILED
AUG 30 1921
F. D. MONCKTON,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

PETER B. HOVLEY,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

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Transcript of Record.

Upon Writ of Error to the United States District Court
of the Southern District of California,
Southern Division.

INDEX TO THE PRINTED TRANSCRIPT OF
RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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The United States Circuit Court of Appeals for the
Ninth Circuit.

Writ of Error.

The United States of America,
Ninth Judicial Circuit,—ss.

The President of the United States, to the Honorable the Judges of the District Court of the United States, for the Southern District of California, Southern Division, GREETING:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between United States of America and Peter B. Hovley, whose true name appears to be Peter P. Hovley, a manifest error hath happened, to the great damage of the said Peter P. Hovley, *alias* Peter B. Hovley, as by his complaint appears.

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same in the said United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Ninth Cir-

cuit may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS, the Honorable WILLIAM H. TAFT, Chief Justice of the United States, the 4th day of August, in the year of our Lord one thousand nine hundred and twenty-one.

CHAS. N. WILLIAMS,
Clerk of the District Court of the United States for
the Southern District of California.

R. S. Zimmerman,
Deputy.

Writ of error allowed by

B. L. GOE,
Judge.

I HEREBY CERTIFY that a copy of the within writ of error was on the 4th day of August, 1921, lodged in the office of the clerk of the said United States District Court, for the Southern District of California, Southern Division, for said defendants in error.

[Seal] CHAS. N. WILLIAMS,
Clerk of the District Court of the United States for
the Southern District of California.

By Douglas Van Dyke,
Deputy Clerk.

[Endorsed]: District Court No. 2045. In the United States Circuit Court of Appeals for the Ninth Circuit. United States of America vs. Peter B. Hovley. Writ of Error. Filed Aug. 4, 1921. Chas. N. Williams, Clerk. Douglas Van Dyke, Deputy.

In the District Court of the United States, for the
Southern District of California, Southern Division.

No. 2045.

UNITED STATES OF AMERICA.

vs.

PETER B. HOVLEY.

Citation on Writ of Error.

United States of America,
Ninth Judicial District,—ss.

The President of the United States, to the United
States of America, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States for the Southern District of California, Southern Division, wherein Peter B. Hovley (whose true name is Peter P. Hovley), is plaintiff in error and you are the defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable BENJAMIN F. BLEDSOE, United States District Judge for the Southern District of California, this — day of

August, in the year of our Lord one thousand nine hundred and twenty-one.

B. L. GOE,
United States District Judge for the Southern District of California.

Service of the above citation is accepted this 4th day of August, A. D. 1921.

ROBERT O'CONNOR,
United States Attorney.
H. L. DICKSON.

[Endorsed]: No. 2045. In the District Court of the United States for the Southern District of California, Southern Division. United States of America vs. Peter B. Hovley. Citation in re Writ of Error. Filed Aug. 4, 1921. Chas. N. Williams, Clerk. Douglas Van Dyke, Deputy.

In the District Court of the United States, Southern District of California, Southern Division.

No. 2045—CRIM.

PETER B. HOVLEY,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Names and Addresses of Attorneys of Record.

For Plaintiff in Error:

THEODORE STENSLAND, Esq., 422-23
Grant Building, Los Angeles, California.

For Defendant in Error:

ROBERT O'CONNOR, Esq., United States At-
torney.

HUGH L. DIXON, Esq., Assistant United
States Attorney, Los Angeles, California.

[1*]

No.——

Filed:——

In the District Court of the United States in and
for the Southern District of California, South-
ern Division.

Indictment.

Viol. Act, June 25, 1910, Mann White Slave Act.

At a stated term of said Court, begun and holden
at the city of Los Angeles, county of Los Angeles,
within and for the Southern Division of the South-
ern District of California, on the second Monday of
January, in the year of our Lord one thousand nine
hundred and twenty;

The Grand Jurors of the United States of
America, chosen, selected and sworn, within and for
the Division and District aforesaid, on their oath
present:

*Page-number appearing at foot of page of original certified Transcript
of Record.

That PETER B. HOVLEY, whose full and true name other than as herein stated is to the Grand Jurors unknown, late of the Southern Division of the Southern District of California, did, on or about the 13th day of February, A. D. 1920, knowingly, wilfully, unlawfully and feloniously transport and cause to be transported and aid and assist in obtaining transportation for and in transporting in interstate commerce a certain woman, to wit, Barbara Phillip, now Barbara Staalduynen, for the purpose of debauchery and for an immoral purpose, and with the intent and purpose to entice and induce the said Barbara Phillip, now Barbara Staalduynen, to give herself up to debauchery and to engage in an immoral practice, and did then and there procure and obtain and caused to be procured and obtained and aid and assist in procuring and obtaining a certain railroad ticket to be used by said Barbara Phillip, now Barbara Staalduynen, in interstate commerce and in the transportation of the said Barbara Phillip, now Barbara Staalduynen, from the city of Chicago, in the State of Illinois, to the city of Los Angeles, in the State of California, for an immoral purpose, and with the intent and purpose then and there on the part of the said Peter B. Hoveley to cause, entice and compel her, the said Barbara Phillip, now Barbara Staalduynen, to give herself up to debauchery and to an immoral practice, to wit, to have [2] sexual intercourse with and to be the mistress of the said defendant, Peter B. Hovley, the said Peter B. Hovley not being then and there the

husband of the said Barbara Phillip, now Barbara Staaldwynen.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the said United States.

ROBERT O'CONNOR,
United States Attorney.

Assistant United States Attorney.

[Endorsed]: No. 2045—Crim. United States District Court, Southern District of California, Southern Division. The United States of America vs. Peter B. Hovley. Indictment. Viol. Mann White Slave Act. A true bill. Elwood De Garino, Foreman. Filed Apr. 30, 1920. Chas. N. Williams, Clerk. By Maury Curtis, Deputy Clerk. Bail, \$2500.00. Robert O'Connor. [3]

At a stated term, to wit, the January Term, A. D. 1920, of the District Court of the United States of America, within and for the Southern District of California, Southern Division, held at the courtroom thereof, on Monday, the 10th day of May, in the year of our Lord one thousand nine hundred and twenty. Present: The Honorable BENJAMIN F. BLEDSOE, District Judge.

No. 2045—CRIM.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PETER B. HOVLEY,

Defendant.

**Minutes of Court—May 10, 1920—Arraignment and
Plea.**

This cause coming on at this time for the arraignment and plea of defendant; Wm. F. Palmer, Esq., Assistant U. S. Attorney, appearing as counsel for the Government, and defendant being present together with his counsel, Geo. H. Woodruff, Esq., and defendant having been called and arraigned, states his name is true as it is stated; and waiving the formal reading of the indictment, now interposes his plea of Not Guilty, and thereupon it is by the Court ordered that this cause be, and the same hereby in continued to the June calendar for setting of same down for trial. [4]

At a stated term, to wit, the January Term, A. D. 1921, of the District Court of the United States of America, within and for the Southern District of California, Southern Division, held at the courtroom thereof, on Friday, the 11th day of February, in the year of our Lord one thousand nine hundred and twenty-one. Present: The Honorable BENJAMIN F. BLEDSOE, District Judge.

No. 2045—CRIM.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PETER B. HOVLEY,

Defendant.

**Minutes of Court—February 11, 1921—Change of
Plea.**

This cause coming on *ex parte*, B. B. Crane, Esq., Assistant U. S. Attorney, appearing for the Government; Geo. H. Woodruff, Esq., appearing as counsel for defendant; and defendant having withdrawn his plea of Not Guilty, now enters his plea of guilty of crime as charged; it is by the Court ordered that this cause be and the same hereby is continued to February 28, 1921, for pronouncement of sentence.

[5]

At a stated term, to wit, the January Term, A. D. 1921, of the District Court of the United States of America, within and for the Southern District of California, Southern Division, held at the courtroom thereof, on Monday, the 7th day of March, in the year of our Lord one thousand nine hundred and twenty-one. Present: The Honorable BENJAMIN F. BLEDSOE, District Judge.

No. 2045—CRIM.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PETER B. HOVLEY,

Defendant.

Minutes of Court—March 7, 1921—Sentence.

This cause coming on this day for pronouncement of sentence; T. F. Green, Esq., Assistant U. S. Attorney, appearing for the Government; Geo. H. Woodruff, Esq., appearing as counsel for defendant; and statement having been made by T. F. Green, Esq., Assistant U. S. Attorney, and by Geo. H. Woodruff, Esq., of counsel as aforesaid for defendant; and defendant having made a statement in his own behalf; the Court now pronounces sentence upon said defendant for the crime of which he now stands convicted, namely: Vio. Act of June 25, 1910, Mann White Slave Act; the judgment of the Court is, that said defendant be confined in the Orange County Jail for the term and period of one year, and pay unto the United States of America a fine in the sum of \$1000.00, and stand committed to said Orange County Jail until said fine is so paid; and on motion of Geo. H. Woodruff, Esq., of counsel for defendant, a stay of execution of fifteen days is granted herein.

In the District Court of the United States, for the
Southern District of California, Southern Division.

No. 2045.

UNITED STATES OF AMERICA

vs.

PETER B. HOVLEY.

Notice of Substitution of Attorneys.

To the United States of America, Plaintiff Herein,
and to J. ROBERT O'CONNOR, Esquire,
United States Attorney:

Please take notice that, after this day, I have substituted Mr. Theodore Stensland as my attorney, in the place and stead of Messrs. George H. Woodruff and Clyde C. Shoemaker, and that Messrs. Woodruff and Shoemaker have, in writing, consented to the said substitution.

Dated, July 21, 1921.

PETER P. HOVLEY,

Defendant.

THEODORE STENSLAND,

Attorney for Defendant.

Consent and notice is hereby given of the substitution of Mr. Theodore Stensland, as attorney for the defendant, for and in the place and stead of the undersigned.

Dated, July 22, 1921.

WOODRUFF & SHOEMAKER,

GEORGE H. WOODRUFF,

Attorneys for Defendant.

Due notice and service of a copy of the above notice of substitution of attorneys for the defendant, in the above-entitled action, is hereby admitted this — day of July, 1921.

R. O'CONNOR,
Per T. F. GREEN,
T—,

United States Attorney. [7]

[Endorsement]: In the District Court of the United States for the Southern District of California, Southern Division. No. 2045. United States of America vs. Peter B. Hovley. Substitution of Attorneys. Filed Jul. 21, 1921, at — min. past — o'clock — M. Chas. N. Williams, Clerk. Douglas Van Dyke, Deputy. [8]

In the District Court of the United States for the Southern District of California, Southern Division.

No. 2045.

UNITED STATES OF AMERICA

vs.

PETER B. HOVLEY.

Petition for Writ of Error.

And now comes the defendant herein and says that, on the 7th day of March, A. D. 1921, at the January Term of the District Court of the United States for the Southern District of California, Southern Division, by the consideration of the said

District Court of the United States for the Southern District of California, Southern Division, in a certain criminal cause depending in said court, to wit, a certain indictment against the above-named defendant, Peter B. Hovley, whose true name is Peter P. Hovley, for knowingly, wilfully, unlawfully and feloniously transporting, and causing to be transported, and aiding and assisting in obtaining transportation for, and in transporting, in interstate commerce, a certain woman, to wit, Barbara Phillip, now Barbara Staalduynen, for the purpose of debauchery and for an immoral purpose, and with the intent and purpose to entice and induce the said Barbara Phillip, now Barbara Staalduynen, to give herself up to debauchery and to engage in an immoral practice, and further, for procuring and obtaining, and causing to be procured and obtained, and aiding and assisting in procuring and obtaining, a certain railroad ticket, to be used by the said Barbara Phillip, now Barbara Staalduynen, in interstate commerce and in the transportation of the said Barbara Phillip, now Barbara Staalduynen, from the city of Chicago, in the State of Illinois, to the city of Los Angeles, in the State of California, for an immoral purpose, with the intent and purpose, then and there on the [9] part of said defendant, to cause, entice and compel said aforementioned woman to give herself up to debauchery, being Criminal Cause No. 2045 in that court, the said defendant, upon his plea of guilty to said indictment, was adjudged and sentenced to be imprisoned in the county jail of Orange County,

in the State of California, for the term and period of one year and to pay to the United States of America a fine of One Thousand Dollars, and execution therefor was accordingly ordered; that, in the rendition of said judgment and sentence and in the record and proceedings in said cause had prior thereto, certain manifest errors have intervened to the great prejudice of the said defendant, which errors are specified in detail in the Assignment of Errors filed with this petition.

WHEREFORE, the said Peter P. Hovley, the defendant in the above-entitled cause, under the name of Peter B. Hovley, feeling himself aggrieved by the judgment and sentence of the Court rendered on his plea of guilty, as aforesaid, and entered therein, comes now, by Theodore Stensland, his attorney, and petitions the Court for an order allowing the said defendant to prosecute a writ of error from the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and for reversal of said judgment and sentence of the District Court of the United States for the Southern District, Southern Division, and also that an order be made that, upon the serving of said writ of error, by lodging a copy thereof for the adverse party, the United States, in the Clerk's Office of the District Court where the record remains, the said defendant be admitted to bail, pending said writ of error, in the sum of Two Thousand and Five Hundred Dollars, conditioned as the law directs, and that, thereupon, all further

proceedings be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals [10] for the Ninth Circuit.

And the said defendant, Peter P. Hovley (whose name, in the aforementioned indictment, erroneously appears as Peter B. Hovley), presents herewith his assignment of errors, in accordance with the rules of the said United States Circuit Court of Appeals and the course and practice of this Honorable Court.

And your petitioner further prays that a citation in due form of law may issue requiring the defendant in error to appear in the United States Circuit Court of Appeals for the Ninth Circuit, and, then and there, make answer to the Assignment of Errors, made by your petitioner, upon the record of the proceedings in said cause.

And your petitioner, Peter P. Hovley (indicted, as aforesaid, under the erroneous name of Peter B. Hovley, will ever pray, etc.

THEODORE STENSLAND,
Attorney for Plaintiff in Error. [11]

In the District Court of the United States for the
Southern District of California, Southern
Division.

No. 2045.

UNITED STATES OF AMERICA

vs.

PETER B. HOVLEY.

Assignment of Errors.

And now comes said Peter P. Hovley (whose name appears, in the indictment in the above-entitled cause, erroneously as Peter B. Hovley), by his attorney, and says that, in the aforesaid proceedings and in the said judgment and sentence, there is manifest error in this, to wit:

I.

The District Court erred in entering said judgment and imposing sentence, upon said plea of guilty, in the manner and form as done, for the following reasons:

- (a) The bill of indictment in this cause, is insufficient to support any judgment against this defendant, in that it fails to allege the necessary and essential elements of any crime against the United States, which said indictment seeks to allege this defendant committed.
- (b) In the said indictment, or in any of the proceedings thereon had, in the District Court, or in the record thereof, there appears nothing sufficient to show jurisdiction, in said District Court, to hear or determine the alleged cause set forth in said indictment, or to render, pronounce or enter judgment thereon, or to pronounce or impose sentence thereon.
- (c) The said indictment, and each and every part thereof, is not specific enough, is repugnant and too vague, indefinite, [12] ambiguous and uncertain, to charge any facts sufficient in law to constitute any crime or offense against the

United States or any law thereof, or to inform this defendant fully of the charge against him, or to make the same clear to the common understanding.

(d) The said indictment, and each and every part thereof, fails to state facts sufficient to charge this defendant with any crime or offense against the United States or any law thereof, and does not describe any crime or offense in violation of, or punishable under, any of the laws thereof.

(e) The said indictment attempts to charge two separate and distinct offenses, to wit:

An offense to transport, cause to be transported, and aid in transporting, in interstate commerce, a certain woman for the purpose of debauchery and other immoral purpose; and

Another offense to procure and obtain, cause to be procured and obtained, and aid and assist in procuring and obtaining, a railroad ticket, to be used by a certain woman, in interstate commerce, in going to a place for an immoral purpose, whereby such woman was transported in interstate commerce.

Said alleged offenses, however, are not separately stated, being joined in one, and the only, count of said indictment; but the matters and things set forth in the purported statements, respectively, of said offenses, so attempted to be charged against this defendant, as aforesaid, are, all and singular, not sufficient in law to constitute any crime or offense

against the United States or any law thereof, or to inform this defendant fully of the charge or charges against him, or to make the same clear to the common understanding, and are not sufficient, in form or substance, to enable this defendant to plead the judgment, predicated thereon, in bar of another action for the same offenses or offense.

(f) The said indictment is insufficient to charge this defendant with the offense of transporting, causing to be transported, [13] or aiding or assisting in obtaining transportation for, or in transporting, in interstate commerce, a woman, for immoral purposes, in that,—

1. In so attempting to charge said offense, the said indictment does not show that said offense, so charged, was or is within the legal jurisdiction of the grand jurors of the United States of America, inquiring for the Southern District of California, by which said grand jurors the said indictment was found and returned.

2. Said indictment fails to show that said offense, so set forth and charged, was or is within the legal jurisdiction of the District Court, wherein said indictment was returned and judgment thereon rendered and sentence thereon imposed.

3. Said indictment does not state, allege or in anywise set forth or show said offense, so charged, to be within the legal jurisdiction of any of the courts of the United States.

4. In attempting to charge said offense, the said indictment does not state, allege or in anywise show that any woman or girl was carried or transported as a passenger, in interstate commerce, from, through, or into any judicial district of the United States.

(g) The said indictment is insufficient to charge this defendant with the offense of knowingly procuring and obtaining, or causing to be procured or obtained, or aiding or assisting in procuring or obtaining, a railroad ticket, or any form of transportation, or evidence of the right thereto, to be used by any woman or girl, in interstate commerce, in going to any place for immoral purposes, whereby such woman or girl was transported in interstate commerce, in that,—

1. In so attempting to charge said offense, the said indictment fails to state, allege, or in anywise show that this defendant [14] did knowingly procure or obtain, or knowingly cause to be procured or obtained, or knowingly aid or assist in procuring or obtaining, any such railroad ticket, or any such other form of transportation or evidence of right thereto.

2. Said indictment does not state, allege or in anywise show that any transportation, in interstate commerce, or any woman or girl was had, effected or consummated, in connection with this defendant's alleged procuring, causing to be procured, or assisting in procuring, such railroad ticket or other form of transportation,

or as a result of any act or conduct on the part of this defendant, or otherwise or at all.

3. In so attempting to charge said offense, the said indictment fails to show that any woman or girl was carried or transported as a passenger, in interstate commerce, from, through or into any judicial district of the United States, and, thereby, said indictment fails to show said offense, so charged, to be within the legal jurisdiction of any of the courts of the United States.

(h) The said indictment does not state, allege or in anywise show any of the following matters, to wit:

1. What the alleged transportation in interstate commerce consisted of or what facts constituted such transportation.

2. Whether such alleged transportation was consummated.

3. What acts were done by this defendant in, or relating to, the consummation of such alleged transportation.

4. When, where or in what manner, or by what means such alleged transportation was commenced, carried out or consummated.

(i) In said indictment, there are alleged no facts from which, by an inspection of said indictment, there is made [15] to appear any of the following matters, to wit:

1. In what respect the transportation, referred to in said indictment, was transportation carried out in interstate commerce.

2. What facts constituted such alleged transportation in interstate commerce.

3. By what acts or conduct, on the part of this defendant, this defendant did transport, or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate commerce, that certain woman designated in said indictment.

4. Whether, by reason of, or as a result of, any act or conduct on the part of this defendant, any woman or girl was ever or at all carried or transported as a passenger, in interstate commerce, from, through or into the district wherein the District Court of the United States for the Southern District of California, Southern Division, has jurisdiction of crimes.

(j) Said indictment does not state or allege any fact or facts showing that this defendant did transport, or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate commerce, any woman or girl; nor the place or manner in which said transportation was obtained; nor the place or district from, through or into which said transportation was had or effected.

(k) Said indictment does not state or allege any fact or facts showing that this defendant did procure or obtain, or assist in procuring or obtaining, any form of transportation, or evidence of right thereto, whereby any woman or girl was transported in interstate commerce or otherwise or at all.

- (l) Said indictment fails to state or allege any fact or facts showing any transportation, in interstate commerce or [16] otherwise, of any woman or girl for any purposes or purpose whatsoever.
- (m) The acts charged in said indictment, or any of said acts, have no connection with interstate commerce made unlawful by any statute of the United States of America.
- (n) The attempted statements of fact, in said indictment, seeking to show an alleged transportation in interstate commerce, are statements of conclusions of law.
- (o) The attempted statements of fact, in said indictment, seeking to show a connection of this defendant with an alleged transportation, in interstate commerce, of a certain woman, are statements of conclusions of law.
- (p) The said indictment is not sufficient, in form or substance, to enable this defendant to plead the judgment, predicated thereon, in bar of another prosecution for the same offenses or offense.
- (q) All and singular, the allegations, in said indictment and in each and every part thereof, attempting to charge this defendant with a violation of law, are conclusions of law.

II.

The District Court erred in pronouncing judgment, upon said plea of guilty, in the manner and form as done,—

For the reasons stated in the Assignment of Error No. I.

III.

The District Court erred in imposing sentence upon said plea of guilty,—

For the reasons stated in the Assignment of Error No. I.

WHEREFORE, the said Peter P. Hovley prays that the aforesaid judgment may be reversed and the aforesaid sentence may be vacated, set aside, canceled and annulled.

THEODORE STENSLAND,
Attorney for Defendant and Plaintiff in Error.

[17]

[Endorsement]: In the District Court of the United States for the Southern District of California, Southern Division. No. 2045. United States of America, vs. Peter B. Hovley. Petition for Writ of Error and Assignment of Errors. Filed Jul. 21, 1921, at — min. past — o'clock — M. Chas. N. Williams, Clerk. Douglas Van Dyke, Deputy. Theodore Stensland, Attorney for Defendant. [18]

UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California.

No. 2045.

Clerk's Office.

UNITED STATES OF AMERICA,

vs.

PETER B. HOVLEY.

Praeipie for Transcript of Record.

To the Clerk of said Court:

Sir: Please issue one typewritten copy (by you duly certified), of the hereinafter designated papers of record, in your office, in the above-entitled cause:

1. Judgment-roll.
2. Petition for writ of error.
3. Assignments of error.
4. Writ of error and order allowing same.
5. Citation and acceptance of service.
6. Substitution of attorneys, and this praeipie.

THEODORE STENSLAND,
Attorney for Plaintiff in Error.

[Endorsement]: No. 2045. U. S. District Court, Southern District of California, Southern Division. United States of America, vs. Peter B. Hovley. Praeipie for Transcript on Writ of Error. Filed August 8, 1921. Chas. N. Williams, Clerk. R. S. Zimmerman, Deputy Clerk. By W. [19]

In the District Court of the United States, in and
for the Southern District of California, South-
ern Division.

No. 2045—CRIM.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PETER B. HOVLEY,

Defendant.

**Certificate of Clerk U. S. District Court to Transcript
of Record.**

I, Chas. N. Williams, Clerk of the District Court of the United States, for the Southern District of California, do hereby certify the foregoing 19 type-written pages, numbered from 1 to 19, inclusive, and comprised in one volume, to be a full, true and correct copy of the indictment, minutes of arraignment and plea, minutes of change of plea, sentence, substitution of attorneys, petition for writ of error, assignment of errors, writ of error and praecipe for transcript on writ of error in the above and therein entitled action, and that the same together constitute the record in said action as specified in the said praecipe filed in my office on behalf of the plaintiff in error by his attorney of record.

I do further certify that the cost of the foregoing record is \$6.25, the amount whereof has been paid me by the plaintiff in error herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District

Court of the United States of America, in and for the Southern District of California, Southern Division, this 19th day of August, in the year of our Lord one thousand nine hundred and twenty-one and of our Independence the one hundred and forty-sixth.

[Seal]

CHAS. N. WILLIAMS,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By R. S. Zimmerman,
Deputy. [20]

[Endorsed]: No. 3726. United States Circuit Court of Appeals for the Ninth Circuit. Peter B. Hovley, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Southern District of California, Southern Division.

Filed August 15, 1921.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 3726.

IN THE
United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Peter B. Hovley,	}
<i>Plaintiff in Error,</i>	
<i>vs.</i>	
The United States of America,	}
<i>Defendant in Error.</i>	

BRIEF OF PLAINTIFF IN ERROR.

THEODORE STENSLAND,
Attorney for Plaintiff in Error.

422-423 Grant Building,
Los Angeles, California.

No. 3726.

IN THE
United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Peter B. Hovley,	}
<i>Plaintiff in Error,</i>	
<i>vs.</i>	
The United States of America,	}
<i>Defendant in Error.</i>	

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

On the 30th day of April, 1920, at the January term, in said year, in the United States District Court for the Southern District of California, Southern Division, the grand jurors of the United States of America, inquiring for said Southern District of California, found, returned and presented to said District Court an indictment against the plaintiff in error herein (whose true name is Peter P. Hovley), in a cause

sounding “The United States of America v. Peter B. Hovley, No. 2045, in the District Court of the United States for the Southern District of California, Southern Division,” said indictment being based on an act of Congress, passed June 25, 1910, commonly known as the Mann White Slave Act.

The offense intended to be charged in said indictment is that denounced by section 2 of the said Mann White Slave Act (act of June 25, 1910, Ch. 395, Sec. 2, 36 Stat. L. U. S. 825), wherein it is provided that:

“Any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any territory or in the District of Columbia, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or who shall knowingly procure or obtain, or cause to be procured or obtained, or aid or assist in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in any territory or the District of Columbia, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice or compel her to give herself up to the practice of

prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in any territory or the District of Columbia, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court.”

(Act June 25, 1910, Ch. 395, Sec. 2, 36 St. L. U. S. 825.)

The term “interstate commerce,” as therein used, is defined, in section 1 of the said Mann White Slave Act, as follows, to-wit:

“The term ‘interstate commerce,’ as used in this act, shall include transportation from any state or territory or the District of Columbia to any other state or territory or the District of Columbia.”

(Act June 25, 1910, Ch. 395, Sec. 2, 36 St. L. U. S. 825.)

Jurisdiction of offenses, designated in said Mann White Slave Act, is specifically given to the United States courts by section 5 of said act, which provides as follows, to-wit:

“Any violation of any of the above sections two, three and four shall be prosecuted in any court having jurisdiction of crimes within the district in which said violation was committed, or from, through, or into which any such woman or girl may have been carried or transported as a

passenger in interstate or foreign commerce, or in any territory or the District of Columbia, contrary to the provisions of any of said sections.”

(Act June 25, 1910, Ch. 395, Sec. 5, 36 St. L. U. S. 826.)

The aforementioned indictment, however, charged the plaintiff in error, in the instant case, with alleged transgressions, in words and figures as follows, to-wit:

“That Peter B. Hovley, whose full and true name other than as herein stated is to the grand jurors unknown, late of the Southern Division of the Southern District of California, did, on or about the 13th day of February, A. D. 1920, knowingly, wilfully, unlawfully and feloniously transport and cause to be transported and aid and assist in obtaining transportation for and in transporting in interstate commerce a certain woman, to-wit, Barbara Phillip, now Barbara Staaldwynen, for the purpose of debauchery and for an immoral purpose, and with the intent and purpose to entice and induce the said Barbara Phillip, now Barbara Staaldwynen, to give herself up to debauchery and to engage in an immoral practice, and did then and there procure and obtain and caused to be procured and obtained and aid and assist in procuring and obtaining a certain railroad ticket to be used by said Barbara Phillip, now Barbara Staaldwynen, in interstate commerce and in the transportation of the said Barbara Phillip, now Barbara Staaldwynen, from the city of Chicago, in the state of Illinois, to the city of Los Angeles, in the state of California, for an immoral purpose, and with the intent and purpose then and there on the part of the said Peter B. Hovley to

cause, entice and compel her, the said Barbara Phillip, now Barbara Staalduyne, to give herself up to debauchery and to an immoral practice, to-wit, to have sexual intercourse with and to be the mistress of the said defendant, Peter B. Hovley, the said Peter B. Hovley not being then and there the husband of the said Barbara Phillip, now Barbara Staalduyne.

“Contrary to the form of the statute in such case made and provided and against the peace and dignity of the said United States.” [Tr. of Record p. 5.]

On this indictment the plaintiff in error herein was arraigned in the United States District Court for the Southern District of California, Southern Division, on the 10th day of May, 1920, and then and there interposed his plea of not guilty thereto. [Tr. of Record p. 8.]

Thereafter, to-wit, on the 11th day of February, 1921, in said United States District Court for the Southern District of California, Southern Division, this plaintiff in error withdrew his aforesaid plea of not guilty and thereupon entered his plea of guilty of the offense charged in the said indictment. [Tr. of Record p. 9.]

Thereafter, to-wit, on the 7th day of March, 1921, in said United States District Court for the Southern District of California, Southern Division, upon his said plea of guilty, as aforesaid, judgment was rendered against this plaintiff in error for the crime of violating the said act of June 25, 1910, known as the Mann White Slave Act, and he was, then and there,

accordingly, sentenced, by the said District Court, to imprisonment in the Orange county jail for the term and period of one year, and to pay a fine to the United States of America in the sum of one thousand dollars, and to stand committed to said Orange county jail until his payment of said fine. [Tr. of Record p. 10.]

On the 26th day of July, 1921, after several consecutive stays of execution of his aforementioned sentence of imprisonment had been allowed by the said United States District Court for the Southern District of California, this plaintiff in error entered upon the execution of said sentence.

Upon errors alleged, in the insufficiency of the indictment to charge an offense or offenses against the United States or any of the laws thereof, and in the jurisdiction and procedure of the court, in rendering said judgment and pronouncing said sentence, upon said plea of guilty, in the manner and form done, as aforesaid, a writ of error was sued out to this Honorable Court.

Specifications of Errors.

Plaintiff in error challenges the sufficiency of the indictment to charge an offense and challenges the jurisdiction of said United States District Court for the Southern District of California to render judgment or pronounce sentence on the plea of guilty to said indictment, and assigns the following as errors of said lower court:

(1) There appears in said indictment no jurisdiction, of the grand jurors of the United States inquiring for the Southern District of California, over the transaction or transactions referred to in said indictment.

(2) There appears in said indictment no jurisdiction, of the United States District Court for the Southern District of California, over the transaction or transactions referred to in said indictment.

(3) The said indictment does not state facts sufficient to charge this plaintiff in error with the offense of knowingly procuring and obtaining, or causing to be procured or obtained, or aiding or assisting in procuring or obtaining, a railroad ticket or any form of transportation, or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in any territory or the District of Columbia, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, *whereby any such woman or girl was transported in interstate or foreign commerce, or in any territory or the District of Columbia.*

(4) The said indictment does not show that, by reason of, or as a result of, any act or conduct on the part of this plaintiff in error, any woman or girl was

ever or at all carried or transported as a passenger, in interstate commerce, from, through or into the district, or in any territory, wherein the District Court of the United States for the Southern District of California has jurisdiction of crimes.

(5) The said indictment fails to set forth the facts, intended therein to constitute the alleged transgression, so particularly as to enable this plaintiff in error to avail himself of the conviction herein in defense of another prosecution for the same offense.

(6) The plea of guilty, by this plaintiff in error, does not cure the jurisdictional defects of said indictment hereinbefore set forth.

(7) The plea of guilty could not be taken as a confession or final admission of the offense intended to be charged in said indictment, for no offense was therein charged.

(8) Plaintiff in error did not waive the jurisdictional defects of said indictment or the insufficiency thereof to state an offense, by his failure to demand a bill of particulars of the matters sought to be charged therein, for a bill of particulars cannot make an indictment valid which fails to state an essential element of the offense.

(9) Neither the jurisdictional defects of said indictment, nor the insufficiency thereof to state an offense, are cured by section 1025 of the Revised Statutes of the United States.

BRIEF OF ARGUMENT AND STATEMENT OF POINTS AND AUTHORITIES.

I.

There Appears in Said Indictment No Jurisdiction of the Grand Jurors of the United States of America Inquiring for the Southern District of California, Over the Transactions Referred to in Said Indictment.

Neither in the consideration of this specification of error, nor, indeed, in urging any of the errors herein specified, is it intended that the controlling question shall be one of niceties in pleading or of refinement in construction or application. On the contrary, the guiding purpose of the plaintiff in error, in his proceedings in error herein, is to submit to the reviewing court two broad general questions, to-wit:

1. Did the lower court have jurisdiction over the transactions set forth in the indictment? and

2. Did said transactions, so set forth in said indictment, constitute a crime or offense against the United States or any of the laws thereof?

In considering these questions, logical sequence requires that the first inquiry be directed to the jurisdiction of the grand jurors presenting said indictment, with reference to the transactions therein referred to.

In this connection, it is to be observed that the indictment, in form and in effect, refers to two distinct transactions, notwithstanding the fact that said

indictment contains but one count. These distinct transactions are as follows:

First: That, on a given day, this plaintiff in error transported, caused to be transported and aided and assisted in obtaining transportation for, and in transporting, a certain woman, in interstate commerce, for immoral purposes.

Second: That, on said given day, this plaintiff in error procured, caused to be procured and assisted in procuring a certain railroad ticket, to be used by said aforesaid certain woman as a means of her transportation, in interstate commerce, from the city of Chicago, in the state of Illinois, to the city of Los Angeles, in the state of California, for immoral purposes. [Tr. of Record p. 6.]

The caption of the indictment refers to a violation of the act of June 25, 1910, known as the Mann White Slave Act. [Tr. of Record p. 5.] In the first section of said act, Congress declares that the term "interstate commerce," as used in said act, shall include transportation from any state or territory or the District of Columbia to any other state or territory or the District of Columbia. (Act of June 25, 1910, Ch. 395, Sec. 1, 36 Stat. L. U. S. 825.)

Hence, it may be said that the aforementioned first distinct transaction, set forth in said indictment, exclusively charges that this plaintiff in error, on the 13th day of February, 1920, knowingly transported, caused to be transported and aided and assisted in

transporting Barbara Phillip from some state or territory or the District of Columbia to some other state or territory or the District of Columbia, for certain immoral purposes, and therewith the said first charge is finally concluded.

This charge, however, does not state where, or in what district, state or territory this plaintiff in error was guilty of acts or conduct whereby he so transported, caused to be transported or aided or assisted in transporting said woman. There is, therefore, nothing in said charge to show that the United States District Court for the Southern District of California, or the grand jurors of the United States inquiring for said district, acquired jurisdiction over the subject-matter of said charge, by reason of the Sixth Amendment of the United States Constitution, which provides that all crimes are to be tried in the state and district where committed. (U. S. Const., 6th Amend.)

Nevertheless, it may be contended that, supplemental to the general jurisdictional provisions of the Constitution, special jurisdiction, of the offenses in question, is provided in the act denouncing them. The said Mann White Slave Act, however, expressly gives special jurisdiction, of violations of the provisions thereof, exclusively to any court having jurisdiction of crimes within the district from, through, or into which any such woman or girl shall have been carried or transported as a passenger in interstate or foreign commerce. (Act of June 25, 1910, Ch. 395, Sec. 5, 36 Stat. L. U. S. 826.) Under such provision, there

is nothing in said charge to show that the United States District Court for the Southern District of California, or the grand jurors of the United States inquiring for said district, had any jurisdiction over the subject-matter of said charge; for the said charge carefully avoids to disclose or designate any specific district from, through, or into which said woman was carried or transported as therein alleged.

There is, therefore, nothing in said indictment to show that the said first charge therein was within the jurisdiction of the grand jurors by whom said indictment was found, returned and presented. Accordingly, said grand jurors had no jurisdiction to find and present said first charge.

Bishop's New Crim. Proc. (2nd Ed.), Ch. 24;

14 Ruling Case Law 181;

U. S. v. Meagher, 37 Fed. 875;

U. S. v. Lacher, 134 U. S. 624;

Todd v. U. S., 158 U. S. 278;

Bartlett v. U. S., 126 Fed. 884;

U. S. v. Hudson, 7 Cranch. 32;

Vernon v. U. S., 146 Fed. 121.

With reference to the second distinct charge contained in said indictment, it is to be observed that, in view of the definition of the term "interstate commerce," set forth in the first section of the said Mann White Slave Act, as hereinbefore quoted (Act of June 25, 1910, Ch. 395, Sec. 1, 36 Stat. L. U. S. 825), the said second charge limits itself to the statement that,

on the 13th day of February, 1920, this plaintiff in error procured, caused to be procured and assisted in procuring a certain railroad ticket for said Barbara Phillip, by which said ticket said woman might have herself transported from some state, or territory, or the District of Columbia to some other state or territory or the District of Columbia, to-wit, from the city of Chicago, in the state of Illinois, to the city of Los Angeles, in the state of California, for immoral purposes.

There is, however, in said charge, nothing to show where, or in what district, state or territory this plaintiff in error so procured, caused to be procured or assisted in procuring said railroad ticket. There is, therefore, nothing in said charge to show that the United States District Court for the Southern District of California, or the grand jurors of the United States inquiring for said district, had jurisdiction over the subject-matter of said charge, by reason of guilty conduct or acts, on the part of this plaintiff in error, within said district. The railroad ticket in question may have been procured in South Africa and still be within the allegations of said charge.

It is true that the indictment states that "then and there" the said plaintiff in error procured, caused to be procured and assisted in procuring said ticket; but, while the word "then," in said context, obviously refers to the 13th day of February, 1920, to-wit, the time set forth in the preceding charge, nevertheless

the word "there," in that context, can find no relation elsewhere in the indictment.

Furthermore, no extenuation, for this absent allegation of place, can be found by reference to the provisions of the Mann White Slave Act; for, in said act, as hereinbefore set forth, the special jurisdictional clause provides only that any court, having jurisdiction of crimes within the district from, through, or into which any such woman or girl shall have been carried or transported, in contravention of said act, shall have jurisdiction of the violations of any of the provisions of said act. Here, however, in this second charge in said indictment, there is no semblance of any allegation that the woman was ever transported or carried, from any state, territory or district, or to any state, territory or district, nor is there anything to show that the railroad ticket in question was ever used by said woman.

There being, then, no allegation of transportation in said second distinct charge in said indictment, it follows that no jurisdiction can be given to any court, by the provisions of the said Mann White Slave Act, with reference to the particular transaction set forth in said charge, which, moreover, does not disclose where any alleged acts of this plaintiff in error were committed.

No jurisdiction, therefore, over the transactions in question being made to appear by the allegations in either of said charges of the indictment, it follows

that the grand jurors, in returning the indictment in the instant case, acted without jurisdiction, and that the United States District Court for the Southern District of California was without jurisdiction to hear or render judgment in the alleged cause set forth in said indictment.

Bishop's New Crim. Proc. (2nd Ed.), Ch. 24;
14 Ruling Case Law 181;
U. S. v. Meagher, 37 Fed. 875;
Vernon v. U. S., 146 Fed. 121;
Ex parte Bain, 121 U. S. 1, 30 L. ed. 149;
Forsythe v. U. S., 9 How. 571, 13 L. ed. 262;
Ex parte Farley, 40 Fed. 66;
U. S. v. Hill, 26 Fed. Cas. No. 15364;
In re Bonner, 151 U. S. 242, 38 L. ed. 149;
In re Mills, 135 U. S. 263, 34 L. ed. 107;
U. S. v. Eaton, 144 U. S. 677, 36 L. ed. 591;
U. S. v. Coolidge, 8 Wheat. 415, 4 L. ed. 124;
U. S. v. Hudson, 7 Cranch. 32, 3 L. ed. 259;
Biddle v. U. S., 156 Fed. 759;
U. S. v. Morrissey, 32 Fed. 147;
Hauser v. People, 46 Barb. (N. Y.) 33.

These jurisdictional defects in the indictment are fatal and cannot be supplied by intendments or reached by way of inference or argument.

Bartlett v. U. S., 126 Fed. 884;
U. S. v. Lacher, 134 U. S. 624;
Todd v. U. S., 158 U. S. 278;
U. S. v. Bathgate, 246 U. S. 220, 62 L. ed. 676.

II.

There Appears in Said Indictment No Jurisdiction of the United States District Court for the Southern District of California Over the Transactions Referred to in Said Indictment.

The argument and the points and authorities to be adduced in support of this specification of error are identical with those given in support of the preceding specification of error.

III.

Said Indictment Does Not State or Allege Any Fact or Facts Showing That This Plaintiff in Error Procured, Caused to Be Procured, or Assisted in Procuring a Railroad Ticket, to Be Used by Any Woman or Girl in Interstate Commerce or in Transportation of Herself From the City of Chicago, in the State of Illinois, to the City of Los Angeles, in the State of California, Whereby Any Such Woman or Girl Was Transported or Carried as a Passenger in Interstate Commerce.

The second charge in the indictment alleges that this plaintiff in error procured, caused to be procured and assisted in procuring a certain railroad ticket, from the city of Chicago to the city of Los Angeles, for a certain woman. There is no allegation, however, that the said ticket was ever used by said woman in transportation of herself from any state or territory

or the District of Columbia to any other state or territory or the District of Columbia.

Section 2 of the Mann White Slave Act, on which the indictment in question was predicated, denounces as a crime such procuring, causing to be procured or assisting in procuring of any ticket, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in any territory or the District of Columbia, in going to any place for immoral purposes, *whereby any such woman or girl is transported in interstate or foreign commerce or in any territory or the District of Columbia.* (Act of June 25, 1910, Ch. 395, Sec. 2, 36 Stat. L. U. S. 825.)

The fact material to be charged, in order to constitute the crime so denounced, is the actual transportation of the woman or girl in interstate or foreign commerce for immoral purposes, and, until such transportation shall have been effected, the crime is not consummated.

Wilson v. U. S., 232 U. S. 563;

Hoke v. U. S., 227 U. S. 308.

Such material fact must be stated clearly and explicitly, in order to be charged in the indictment, and cannot be left to intendment or reached by way of inference or argument.

Bartlett v. U. S., 126 Fed. 884;

U. S. v. Lacher, 134 U. S. 624;

Todd v. U. S., 158 U. S. 278;

Fontans v. U. S., 262 Fed. 283;

U. S. v. Hess, 124 U. S. 483.

No such transportation being charged as consummated, the said indictment, in so far as it refers to the procuring of said railroad ticket, does not state facts sufficient to constitute a crime against the United States or any of the laws thereof.

IV.

The Charges, in This Indictment, Are Neither So Certain Nor So Specific That, Upon Conviction Thereon, the Indictment, or the Judgment Upon It, Can Constitute a Defense to a Second Prosecution of the Same Defendant for the Same Offense.

As hereinbefore set forth, the first charge laid in said indictment, in view of the definition, in the Mann White Slave Act, of the term "interstate commerce," merely alleges that, on the 13th day of February, 1920, Peter B. Hovley transported, caused to be transported and aided and assisted in transporting a certain woman, to-wit, Barbara Phillip, now Barbara Staalduynen, for certain immoral purposes, from some state or territory or the District of Columbia to some other state or territory or the District of Columbia, in violation of the Mann White Slave Act. [Tr. of Record pp. 5-6; Act of June 25, 1910, Ch. 395, Sec. 1, 36 Stat. L. U. S. 825.]

The indictment states no facts from which the places, occasions or particulars, on which the state-

ments therein were alleged to have been made, can be identified. In the event of a subsequent prosecution for the same offense, especially in another judicial district of the United States, from, through or into which said woman may have been transported in violation of the Mann White Slave Act, the question of prior conviction or former jeopardy could be determined only from the consideration of this indictment and the judgment thereon rendered. Any statements of this defendant in the lower, made prior or subsequent to his plea of guilty, and any other statements heard by the trial judge do not become a part of the judgment.

Hence, the indictment and judgment fail to identify the charges, so that another prosecution therefor would be barred thereby.

The second charge laid in said indictment, as heretofore shown, fails to allege any transportation in violation of the Mann White Slave Act, and thereby fails to supply the deficiency in the first charge.

The indictment, therefore, in the instant case, is fatally defective.

Fontana v. U. S., 262 Fed. 283;
Florence v. U. S., 186 Fed. 961;
Winters v. U. S., 201 Fed. 845;
U. S. v. Lacher, 134 U. S. 624;
U. S. v. Bathgate, 246 U. S. 278;
Burton v. U. S., 202 U. S. 344;
U. S. v. Cruikshank, 92 U. S. 542.

V.

The Jurisdictional Defects in the Indictment, or Its Failure to Charge an Offense, Were Not Cured or Waived by Plea of Guilty.

12 Cyc. 353;

Hocking Valley R. Co. v. U. S., 210 Fed. 735.

VI.

Plea of Guilty Cannot Be Taken as a Final Admission of the Offense When the Indictment Is Materially Defective.

Hocking Valley R. Co. v. U. S., 210 Fed. 735;

Hogue v. State, 13 Ohio Cir. 567;

12 Cyc. 353.

VII.

The Jurisdictional Defects of the Indictment, or Its Failure to Charge an Offense, Were Not Cured or Waived by Defendant's Failure to Demand a Bill of Particulars.

U. S. v. Bayaud, 16 Fed. 376;

May v. U. S., 199 Fed. 53.

VIII.

The Defects in the Indictment, Wherein No Venue or Jurisdiction Appears, or No Offense Is Charged, Are Not Remedied by Section 1025 of the Revised Statutes of the United States.

U. S. v. Morrissey, 32 Fed. 147.

Conclusion.

In submitting the hereinbefore specified errors in the indictment and the proceedings thereon had in the lower court, in the case at bar, counsel for plaintiff in error has conscientiously sought to avoid any reference to, or commentary upon, defects of mere form, as they appear in the transcript of record, and has endeavored to limit his brief of argument to errors which, if unchallenged in the proceedings herein, would virtually deprive this plaintiff in error of the protection of that basic principle of English and American jurisprudence which supports our constitutional guaranty that no man shall be deprived of liberty, among other rights, without due process of law. The weight of judicial authority has ever held, and continues to hold, that there shall be no prosecution or conviction for crime unless the court in which the prosecution is instituted and carried on has jurisdiction of the offense charged, such jurisdiction first having been ascertained and made manifest in the indictment by which the prosecution is instituted. It is generally conceded that it is an indispensable element of due process of law that the indictment shall set forth facts constituting the alleged transgression so particularly as to enable the accused to avail himself of a conviction or acquittal in defense of another prosecution for the same offense.

In the instant case, the indictment neither stated an offense nor made manifest the jurisdiction of the lower court to consider the offense intended to be charged.

All of which is respectfully submitted.

THEODORE STENSLAND,
Attorney for Plaintiff in Error.

No. 3726.

IN THE
United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Peter B. Hovley,
Plaintiff in Error,
vs.
The United States of America,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

ROBERT O'CONNOR,
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Assistant United States Attorney.

PARKER & STONE Co., Law Printers, 232 New High St., Los Angeles, Cal.

FILED
SEP 27 1921
F. D. MONKTON
CLERK

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Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

Section 2 of the Act of June 25, 1910, 36 Statutes, at Large, provides:

“Any person who shall knowingly transport, or cause to be transported, or aid or assist in obtaining transportation for, or in transporting in interstate or foreign commerce * * * any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice or compel such woman or girl to become a prostitute, or to give herself up to debauchery, or to

engage in any other immoral practice; or who shall knowingly procure or obtain * * * or aid or assist in procuring and obtaining any ticket or any form of transportation * * * to be used by any woman or girl in interstate or foreign commerce * * * in going to any place for the purpose of prostitution or debauchey, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce * * * shall be deemed guilty of felony, etc.”

In the case at bar, the indictment therein, stripped of legal verbiage, charges that plaintiff in error did, on the 13th of February, A. D. 1920, knowingly, wilfully, unlawfully and feloniously transport, and cause to be transported and aid and assist in obtaining transportation for, and in transporting in interstate commerce, a certain woman, to-wit: Barbara Phillip, for the purpose of debauchery, and with the intent and purpose to induce the said Barbara Phillip to give herself up to debauchery, and did procure and aid and assist in procuring a railroad ticket, to be used by the said Barbara Phillip, in interstate commerce, and in the transportation of the said Barbara Phillip, from the city of Chicago, Illinois, to the city of Los Angeles, California, for an immoral purpose, and the fair import of the above charge is, that the defendant in

error, in violation of the statute quoted, did cause to be transported, and procure transportation for the said woman, in interstate commerce, from Chicago, Illinois, to Los Angeles, California, in violation of the statute.

The intent of the defendant in error, to subject the woman transported, to debauchery, need not be consummated by the commission of the specific act of prostitution or debauchery on the part of such woman.

U. S. v. Brand, 229 Fed. 847;

Wilson v. U. S., 232 U. S. 563.

No objection was made to the sufficiency of the indictment in the case at bar, by demurrer, motion to quash or any other manner, until after the verdict, and while it may be true that the defendant in error, by waiting until that time, does not waive the objection that some substantial element of crime is omitted, he does waive all objections which run to the mere form in which the various elements of the crime are stated, or to the fact that the indictment is inartificially drawn.

Dunbar v. U. S., 156 U. S. 190, 191.

After a plea of guilty, the only objection that can be made to the indictment is that it fails to describe the various acts intended to be proved with that reasonable certainty which the law requires to constitute a valid indictment.

U. S. v. Bayaud, 16 Fed. 376.

It is respectfully submitted that the indictment is sufficient to charge the offense laid, and that it informs the plaintiff in error of the crime sufficiently to put him upon notice of the offense with which he is charged, and that the subsequent plea of guilty and acknowledgment of all the material elements of the crime on the part of the plaintiff in error, certainly would leave him in no doubt as to the crime charged in the indictment, and we respectfully submit that the judgment of conviction should be sustained.

ROBERT O'CONNOR,

United States Attorney,

HUGH L. DICKSON,

Assistant United States Attorney.

